Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

ADVENTURE RESOURCES, INC.,

Petitioner,

v.

MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOTT A. SEGAL, PAUL R. DEAN, Trustees of the UMWA 1950 Pension Trust And the UMWA 1974 Pension Trust, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Adventure Resources, Inc. owed pre-bankruptcy contributions to union pension funds and did not assume or reject its collective bargaining agreement with the union during its Chapter 11 bankruptcy case. The question presented is:

Whether the pre-bankruptcy obligations due under an unrejected and unassumed collective bargaining agreement are entitled to first priority, administrative claim status over the pre-bankruptcy claims of non-union employees and other creditors under the provisions of 11 U.S.C. §§ 365, 1113.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties in the court of appeals: Amigo Smokeless Coal Company; Tommy Creek Coal Company; Green Mountain Energy, Incorporated; M.A.E. Services, Incorporated; Maben Energy Corporation; Raleigh Leasing Incorporated; Stony Coal Company; Spruce Laurel Coal Company; Hawley Coal Mining Corporation; Bickford Mining, Incorporated; Barrett Fuel Corporation; East Gulf Fuel Corporation; Coal-X Equipment & Supply Company, Incorporated; Beckley Repair & Hydraulic Service Incorporated; Half-Way, Incorporated; Chesapeake Leasing, Incorporated; Piney Fuel Corporation; Lakeside Leasing, Incorporated; Raleigh Services, Incorporated; Atlas Leasing Incorporated; Sugar Camp Mining Incorporated; HD Enterprises, Limited; Jet Coal Services, Incorporated; Microblack, Incorporated; Dover Coal Sales, Incorporated; No. 10 Mining, Incorporated; Panther Red Ash Land Company, Incorporated; United Mine Workers of America 1974 Pension Trust; United Mine Workers of America 1950 Pension Trust; Michael H. Holland, Marty D. Hudson, Elliott A. Segal, Thomas O. S. Rand, Cariton R. Sickles, Gail R. Wilensky, William P. Hobgood, Trustees of the United Mine Workers of America Combined Benefit Fund; United Mine Workers of America Combined Fund; Michael H. Holland, Marty D. Hudson, Thomas Connors and Robert D. Wallace, Trustees of the UMWA 1992 Benefit Plan; United Mine Workers of America 1992 Benefit Plan; Michael H. Holland, Marty D. Hudson, Thomas F. Connors, Elliott A. Segal, Trustees of the UMWA 1993 Benefit Plan; and Michael H. Holland, Marty

LIST OF PARTIES – Continued

D. Hudson, Elliott A. Segal, Joseph J. Stahl, II, Trustees of the UMWA Cash Deferred Savings Plan of 1988. All parent and subsidiary companies of Petitioner, Adventure Resources, Inc. and of the parties below are included in the foregoing list of parties.

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PETITION FOR A WRIT OF CERTIORARI

Adventure Resources, Inc. ("Adventure"), by its bankruptcy trustee, H. Lynden Graham ("Trustee"), respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered February 27, 1998, in order to resolve the conflict between the Second, Third, Fourth and Sixth Circuit Courts of Appeal on the important issue presented herein.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 137 F.3d 786. The opinion of the district court is reported at 193 B.R. 787 (App. 31).

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1998. A petition for rehearing and suggestion for rehearing *en banc* was denied on April 24, 1998. App. 55. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is envoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Bankruptcy Code involved are 11 U.S.C. §§ 365, 503, 507, 1113, which are reproduced in Appendix 61-89.

STATEMENT OF THE CASE

Adventure and its related companies were parties to a collective bargaining agreement with the United Mine Workers of America ("UMWA"). In December 1992, Adventure filed a chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of West Virginia. During the bankruptcy proceeding, the term of the agreement expired. After expiration of the agreement in 1993, the UMWA and Adventure entered into a new collective bargaining agreement. At no time did Adventure either assume or reject the agreements pursuant to the Bankruptcy Code.

The Adventure reorganization was unsuccessful and its bankruptcy case was converted to a chapter 7 proceeding. The chapter 7 Trustee for Adventure is now faced with over $12 million in pre-bankruptcy claims of the UMWA Health and Retirement Funds ("UMWA Funds") arising under the agreements. These claims arose entirely in the years prior to Adventure's bankruptcy proceeding and represent claims for unpaid pension contributions.

During the reorganization proceedings, Adventure filed an adversary proceeding in the bankruptcy court seeking a determination of the priority of claims filed by the UMWA Funds. The district court withdrew reference

of the proceeding to decide the issues presented. The UMWA Funds argued before the district court below that these pre-petition claims were conferred first priority, administrative claim status in Adventure's chapter 11 case under the provisions of Sections 1113 and 1114 of the Bankruptcy Code. On March 8, 1996 the district court issued an opinion which rejected that argument and determined that only post-petition pension contribution claims were entitled to administrative claim status.[1] App. 31.

The court of appeals reversed and held that the combined applications of Sections 365 and 1113 of the Bankruptcy Code did provide for administrative claim status of the pre-petition claims under Section 507. This conclusion was based upon the court of appeal's view that Adventure's failure to reject its pre-petition labor agreement under Section 1113 was tantamount to assuming the agreement under Section 365. The UMWA Funds' pension claims were deemed by the court of appeals to be elevated to administrative status due to the implied assumption of the agreement. The court of appeals did not reconcile its view with contrary authority or the provisions of Section 365 that only allow bankruptcy debtors to assume agreements based upon an affirmative request that is approved by the bankruptcy court.

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[1] In the post-petition labor agreement entered into by the UMWA and *Adventure* in 1993, the parties agreed that the entry into the agreement would not affect the priority of any claim at issue in the pending adversary proceeding before the district court.

Adventure's petition for rehearing and suggestion for rehearing *en banc* were denied.

REASONS FOR GRANTING THE WRIT

The decision of the Fourth Circuit Court of Appeals is in direct conflict with the opinions of the Second and Third Circuits of Appeal in *Airline-Pilots' Ass'n Int'l v. Shugrue* (*In re Ionosphere Clubs, Inc.*), 22 F.3d 403 (2nd Cir. 1994) and *In re Roth American, Inc.*, 975 F.2d 949 (3rd Cir. 1992). The court of appeals' decision is consistent with the Sixth Circuit's decision in *United Steelworkers of America v. Unimet Corp.* (*In re Unimet Corp.*), 842 F.2d 879 (6th Cir.), *cert. denied*, 488 U.S. 828 (1988). "To date, the 2nd, 3rd and 6th Circuits have issued opinions interpreting § 1113(f) differently". *Priority of Claims Under Unmodified Collective Bargaining Agreements*, 16 Am. Bankr. Inst. J. 36 (1997). Such a conflict of the circuits must be resolved to allow a uniform treatment of claims in bankruptcy cases.

The Second and Third Circuit cases both involved pre-petition claims under unrejected collective bargaining agreements. These decisions concluded that, in enacting Section 1113 to establish procedures for the rejection of collective bargaining agreements, Congress did not intend to establish a claim priority for claims under the agreements. Based upon this finding, the *Roth* and *Ionosphere* courts found that Section 1113 does not create an administrative claim priority for pre-petition claims.

In contrast to the approaches in *Roth* and *Ionosphere*, the court of appeals in *Adventure* granted administrative claim status to the UMWA Funds' pre-petition claims

based upon Adventure's presumed assumption of its labor agreement. While citing with approval the precedent from the Second and Third Circuits, the *Adventure* decision reached the opposite result under the same facts. The articulated difference in *Adventure* was the Fourth Circuit's conclusion that Section 1113 must be read in conjunction with Section 365. Section 365 has been interpreted by this Court, in an opinion issued prior to the enactment of Section 1113, to provide that the assumption of any executory contract results in pre-petition claims being elevated to first priority, administrative status. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

The determination in *Adventure* that pre-petition claims under unrejected collective bargaining agreements are entitled to administrative status was the same result reached by the Sixth Circuit in *Unimet*. Based on different applications of the Bankruptcy Code, *Unimet* and *Adventure* both granted payment priorities to pre-petition labor claims out of concern that there must be enforcement of the provisions of Section 1113(f) requiring debtors not to breach collective bargaining agreements without court approval.

The *Roth* and *Ionosphere* decisions present a more reasoned approach. They recognize that the priority of a bankruptcy claim may not be implied and can only be established by specific congressional enactment. In contrast, *Adventure* and *Unimet* imply a claim treatment where none is specifically provided by statute. The result of this implied claim treatment is that pre-petition claims of non-union employees, taxing authorities and trade creditors are less likely to be paid than the pre-petition claims of union employees and pension plans.

The analysis of the provisions of Section 1113 and other provisions differ in the decisions of the four courts of appeal so as to create a conflict between them which is clear and irreconcilable. Certiorari is appropriate.

I. THE COURT OF APPEALS' DECISION CREATES AN IMPLIED ADMINISTRATIVE CLAIM TO FAVOR LABOR AGREEMENT CREDITORS THAT ALTERS STATUTORY CLAIM PRIORITIES.

The ultimate issue presented in *Adventure* was whether pre-petition claims of the UMWA Funds may be moved to the head of the line for bankruptcy payment by being deemed administrative claims. Priorities for claim distribution are provided in Section 507 of the Bankruptcy Code. This priority schedule is designed to provide payment of certain classes of claims by requiring that they be paid first before others are satisfied. "Because the presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among its creditors, statutory priorities are narrowly construed". *Trustees of the Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100 (2nd Cir. 1986) (citing *Joint Indus. Board v. U.S.*, 391 U.S. 224, 228 (1968)). "[I]f one claimant is to be preferred over others, the purpose should be clear from the statute". *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952).

Under the provisions of the Bankruptcy Code, an administrative claim is normally for "actual, necessary costs and expenses of preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case". 11 U.S.C.

§ 503(b)(1)(A). Accordingly, this preferred treatment is normally reserved for claims which arise post-petition. Such administrative claims have first priority in the payment of unsecured claims under Section 507(a)(1). The other priorities established under Section 507(a)(2)-(8) are for specified, pre-petition claims which are granted a payment priority below that provided for administrative claims.

While the court of appeals in *Adventure* implied a claim priority for pre-petition claims of union employees and pension funds, where no rejection of their collective bargaining agreement occurs, there is no provision in the Bankruptcy Code that provides for such treatment. The court of appeal's finding was instead based upon the assumption that a failure to reject a collective bargaining agreement under Section 1113 is an implied assumption of that agreement under Section 365. In reaching this result, the court of appeals ignored the provisions of Section 365 that provide that agreements may only be assumed by an affirmative assumption by the debtor upon approval by the bankruptcy court. The novel construction of the statutes in *Adventure* to create a new administrative claim contradicts this Court's direction that courts must give effect to the Bankruptcy Code and cannot make policy decisions to alter Congress' intent. *United States v. Noland*, 116 S.Ct. 1524, 1527-28 (1996); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

II. THE STATUTORY INTERPRETATION OF THE COURT OF APPEALS CONFLICTS WITH THE MORE REASONED POSITION OF THE OTHER CIRCUITS.

A consideration of the analysis of the court of appeals in *Adventure* reveals an erroneous interpretation of Sections 365, 507 and 1113 that is at odds with prior authority. This consideration begins with the provisions of Section 1113 which provide that a bankruptcy debtor may only modify or reject a collective bargaining agreement under certain defined procedures that must be reviewed and approved by the bankruptcy court. Until any court approved rejection or modification, the debtor is directed by the statute to not alter or breach the terms of the agreement. 11 U.S.C. § 1113(f).

Section 1113 was enacted under the 1984 amendments to the Bankruptcy Code to protect collective bargaining employees from arbitrary use of the provisions of Section 365(a). Section 365(a) provides that a debtor may, with court approval, either assume or reject any executory contract. 11 U.S.C. § 365(a). Until the passage of Section 1113, Section 365 had been applied to collective bargaining agreements. *NLRB v. Bildisco & Bildisco*, 465 U.S. at 522. The standard under Section 365 for the bankruptcy court to approve a request by a debtor to assume or reject any contract is whether the requested act is in the best interest of the bankruptcy estate. Since this standard provided only limited protection for bargaining employees, Congress responded to *Bildisco* by enacting Section 1113.

After the passage of Section 1113, union employees and pension plans began to argue that Congress intended this provision to enhance the bankruptcy payment priority for wages and benefits defined by a collective bargaining agreement. Since this section provides a debtor shall not breach or terminate a union agreement until it is modified or rejected upon approval of the bankruptcy court, the union claimants argued that failure to reject such an agreement meant all pre-petition claims of union employees and benefit plans must be paid. The error in this position was that Section 1113 states nothing about claim priority.

Prior to the enactment of Section 1113, both union and non-union employees and benefit plans already had administrative priority for all post-petition wages and benefits under Section 503(b)(1)(A). Pre-petition wages and benefits had priority treatment after administrative claims up to $2,000 per employee.[2] 11 U.S.C. § 507(a)(3) and (4). The new issue presented by Section 1113 was whether the pre-petition wages and benefits of union employees and retirees could be elevated from their pre-petition priority under Section 507(a)(3) and (4) to post-petition, administrative status under Section 503(b), if their collective bargaining is never rejected.

The Second and Third Circuits expressly rejected this argument in *Roth* and *Ionosphere* based upon the finding that, in enacting Section 1113, Congress did not intend to

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[2] The $2,000 per employee limit was increased to $4,000 under the 1994 amendments to the Bankruptcy Code.

upset the careful ordering of claim priorities under Section 507. This finding has been adopted by a majority of the recent decisions of the lower courts. *E.g., Jordan v. Rayman, Martin & Fader, Inc. (In re Rayman, Martin & Fader Inc.)*, 170 B.R. 286 (D. Md. 1994); *Jones Truck Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Fund (In re Jones Truck Lines, Inc.)*, 166 B.R. 885 (Bankr. W.D. Ark. 1994); *In re Armstrong Store Fixtures Corp.*, 135 B.R. 18, *reconsideration denied*, 139 B.R. 347 (Bankr. W.D. Pa. 1992). *Also, see Shipwrights, Joiners and Caulkers Local 2071 of the United Brotherhood of Carpenters v. Uniflite, Inc. (In re Murray Industries, Inc.)*, 110 B.R. 585 (Bankr. M.D. Fla. 1990), *appeal vacated as moot*, 140 B.R. 298 (M.D. Fla. 1992).

Courts following *Roth* have distinguished the contrary position of the Sixth Circuit's decision in *Unimet*. In *Unimet*, a bankruptcy debtor sought to reject its collective bargaining and was denied that authority by the bankruptcy court. The lower courts later denied administrative status to the union retirees' medical claims upon the finding that only employees were protected by Section 1113 and that the claims arose pre-petition. In reversing this decision, the Sixth Circuit determined that retirees were also protected by Section 1113 and found retirees' claims were entitled to priority, whether or not they qualified as Section 503 administrative claims.[3] 842 F.2d at 884. In reaching its conclusion, the Sixth Circuit implied a priority in payment based upon the provisions

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[3] 11 U.S.C. § 1114 was enacted after the *Unimet* decision to protect retiree benefit plans. The retiree plans protected by Section 1114 include health and death benefits, but do not include pension plans.

of Section 1113(f), prohibiting unilateral modification of a collective bargaining agreement. Despite the limitations of the Sixth Circuit decision, many lower courts have interpreted *Unimet* to support an administrative or super administrative claim priority for claims under collective bargaining agreements. *E.g., Eagle, Inc. v. Local No. 537 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Indus. of U.S. and Canada, AFL-CIO*, 198 B.R. 637 (D. Mass 1996); *International Union v. Acorn Building Components, Inc. (In re Acorn Bldg. Components, Inc.)*, 170 B.R. 317 (E.D. Mich. 1994); *Metropolitan Distribution Services, Inc. v. Local 153 OPEIU (In re Golden Distributors, Ltd.)*, 152 B.R. 35 (S.D. N.Y. 1992); *In re Arlene's Sportswear, Inc.*, 140 B.R. 25 (Bankr. D. Mass. 1997).

Adventure is at odds with the more recent opinions in *Roth* and *Ionosphere*, but does not explain the difference nor does it even suggest there is a difference between its decision and those in the other circuits. On the other hand, the court of appeals indicated its disapproval of *Unimet*, but ultimately reached the same result in *Unimet*. Rather than rely on the disapproved analysis of *Unimet* under Section 1113(f), the court of appeals in *Adventure* created a new rationale under Section 365.

The conflict of the *Adventure* decision is even more remarkable when one considers that the facts in *Adventure* are the same on all relevant points as those in *Roth*. In *Roth*, the employer had filed bankruptcy while it was a party to a collective bargaining agreement with the International Brotherhood of Teamsters. 975 F.2d at 950. During the bankruptcy, the collective bargaining agreement expired, without the debtor's assumption or rejection of

the agreement. The debtor then entered into a new collective bargaining agreement which was also not assumed or rejected. Later, the debtor had to cease operation and sell off its business in the bankruptcy proceeding, which gave rise to unpaid claims under both the pre-petition and post-petition collective bargaining agreements. *Id.* at 951.

The *Roth* panel rejected the union argument that benefit claims due under the pre-bankruptcy agreement were administrative claims based on the theory that the debtor had assumed the agreement by its failure to reject the agreement under Section 1113. In rejecting the position adopted by the *Adventure* decision, the Second Circuit stated in *Roth*:

> The Union contends that since Roth American has not sought to reject the collective bargaining agreement under Section 1113, Roth American has "assumed" the collective bargaining agreement by operation of law, and that Roth American thus is bound by all of its terms. We agree with the Union up to this point. But it simply does not follow, as the Union contends, that all claims under unrejected collective bargaining agreements are entitled to first priority. . . . [W]e will also conclude that 11 U.S.C. § 1113 does not create a super priority or automatic first priority for claims under an unrejected collective bargaining agreement.

975 F.2d at 957-58.

The *Roth* opinion was later endorsed by the Second Circuit in *Ionosphere* as a better reasoned position than that articulated in *Unimet*. *Ionosphere*, 22 F.3d at 407. This more reasoned position was adopted by the district court

below and should have been affirmed by the Fourth Circuit on appeal.

III. THE PLAIN PROVISIONS OF THE BANKRUPTCY CODE WERE MISINTERPRETED BY THE COURT OF APPEALS.

The court of appeals misinterpreted or ignored the plain language of the Bankruptcy Code. This is reflected by the strained construction in *Adventure* attached to the provisions of Sections 365, 507 and 1113. The *Adventure* decision begins by the supportable position that the claim priorities of Section 507 cannot be upset by implication, but ends by misinterpreting those priorities.

> [a] bankruptcy claim arising from the breach of a collective bargaining agreement may be accorded priority status only insofar as it fits into one of the categories singled out for preferential treatment in section 507. Fortunately for the Funds, the claims of the Pension Trust are the proverbial round peg.

App. 25.

The foregoing analysis is irreconcilable with the final determination in *Adventure* that the UMWA Funds claims are administrative claims. Section 507 does not provide any specific "categories" for administrative claims, but merely states administrative claims under Section 503 have a payment priority over various categories of pre-petition claims identified in that section. 11 U.S.C. § 507(a)(1). The only categories in Section 507 constituting pegs for collective bargaining agreement claims are the pre-petition priorities provided for employee wages and

benefit funds in Sections 507(a)(3) and (4). While the UMWA Funds' claims are pre-petition claims which fit within the type of claims described in 507(a)(3) and (4), these provisions do not grant administrative status to such claims. Instead, these claims are granted a lesser priority behind administrative claims. Given the conflict between these provisions and *Adventure*'s finding of administrative status of the UMWA Fund claims, it would appear that the court of appeals erred in construing the normal application of Section 507.

To further support administrative claim status, the *Adventure* court goes on to introduce a new view not adopted in *Roth* and related decisions. *Adventure* concludes that, upon an employer's failure to reject a collective bargaining agreement, an employer must be deemed to have assumed the agreement. The decision then looks to Section 365 to determine the effect of assumption as being the duty to pay all claims under the agreement, including those arising pre-petition. To the extent Section 365 dictates the result in *Adventure*, it would also be equally applicable in *Roth*, *Ionosphere* and cases with unrejected collective bargaining agreements with which *Adventure* is irreconcilably in conflict. The only seeming explanation for the discrepancy is that the court of appeals erred in not accounting for the provisions of Section 365(a) which require a debtor to affirmatively act to assume any executory contract.

The court of appeal's misconstruction of this section is better understood by viewing the difference between assumption and rejection of contracts under Section 365 from that provided under Section 1113. Under Section 365, a contract is not deemed assumed simply because it

is not rejected. In order to assume a contract under this section, a debtor must specifically seek and obtain the bankruptcy court's approval to assume the contract. 11 U.S.C. § 365(a).

Section 365 does not dictate a specific priority for pre-petition claims upon the assumption of a contract, but states that to gain bankruptcy court approval for an assumption of a contract, all defaults in the contract must be cured. 11 U.S.C. § 365(b)(1). This provision has been interpreted to provide that all obligations under an assumed contract, including those due pre-bankruptcy, must be paid in full as administrative claims. This Court noted in *Bildisco* that:

> Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract *cum onere* (citation omitted) and the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority of the debtor's estate, 11 U.S.C. § 503(b)(1).

Bildisco at 531-532. If the bankruptcy court grants a rejection of the contract, or under certain circumstances the contract is not assumed, then it is automatically deemed rejected and the pre-petition obligations due under the contract are treated as general, unsecured claims, pursuant to 11 U.S.C. § 502(g).

Section 1113(a) provides that a bankruptcy debtor "may assume or reject a collective bargaining agreement only in accordance with the provisions of this section". While subparagraph (a) of Section 1113 refers to both assumption and rejection, the balance of the provisions of this section only deal with how and what a debtor must

show to modify or reject a collective bargaining agreement. There is no provision in Section 1113 for how or what a bankruptcy debtor or trustee must do to assume a collective bargaining agreement.

The *Adventure* court interprets the Congressional omission in Section 1113 of a procedure for the assumption of a collective bargaining agreement to mean that there is an automatic assumption of a collective bargaining agreement upon the failure to reject the agreement. This position does not logically harmonize Section 1113 with Section 365. The Trustee submits that the more consistent conclusion is that, to assume a collective bargaining agreement, one would turn to Section 365 to determine the procedure for assumption, just as the court of appeals looked to this section to determine the effect of assumption. The procedure provided by Section 365 is a court approved request by the debtor for such an assumption. Without following this procedure, no contract is assumed under Section 365.

No decision since *Unimet* supports *Adventure*'s interpretation of Section 1113 as removing the plain requirements of Section 365(a) that an express assumption must be approved by the court. The court of appeals did rely on the district court's opinion in *Mass. Air Conditioning & Heating Corp. v. McCoy*, 196 B.R. 659, (D. Mass. 1996) for that proposition. The *McCoy* court only concluded that Section 365 continues to apply to collective bargaining agreements, except where it conflicts with the provisions of Section 1113. The district court in *McCoy* did not determine, as the court of appeals did in *Adventure*, that failure to reject a collective bargaining was tantamount to assuming the agreement under Section 365. Instead, the

bankruptcy court in *McCoy* required the debtor employer to make a specific election to assume or reject its collective bargaining agreement. The debtor chose to assume the agreement and this assumption was approved by the bankruptcy court. Thus, when the *McCoy* court found that the debtor had a duty to pay pre-petition claims under the assumed agreement, it did so only upon an express assumption under the provisions of Section 365.

The *Adventure* decision notes that it does not tread any new ground in finding that assumption of an executory contract under Section 365 means pre-petition claims arising from the contract are to be paid as administrative claims.[4] There is no error in the finding of the court of appeals that assumption of an executory contract results in pre-petition obligations under the contract being treated as an administrative expense. The conflict presented by *Adventure* is its finding that contract assumption can occur without an affirmative act by the bankruptcy debtor and approval of that act by the bankruptcy court after notice to creditors.

While the duty of a debtor employer to comply with the terms of a collective bargaining agreement in post-

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[4] In all but one of the six decisions cited for this proposition in the *Adventure* decision, the debtor affirmatively assumed a lease under Section 365. See footnote 18, App. 29. A pre-*Roth* decision of *In re Moline Corp.*, 144 B.R. 75 (Bankr. E.D. Ill. 1992) did involve a collective bargaining agreement that had not been assumed or rejected. During the pendency of the bankruptcy, a union moved for its claims to be granted administrative claim status and the bankruptcy court denied that request finding the debtor had not yet assumed the contract.

bankruptcy employment is undisputed, the implied conclusion of *Adventure* that this requirement elevates pre-petition obligations under the wage agreement to administrative status, has no support. Under Section 365, various types of executory contracts are required to be performed to the extent of post-bankruptcy obligations, but there is no provision that pre-petition obligations must be paid unless and until a court approves the assumption of the agreement. *See e.g., Nostas Associates v. Costich (In re Klein Sleep Products, Inc.)*, 78 F.3d 18, 26 (2nd Cir. 1996).

The Trustee submits that the conflict of *Adventure* with the other circuits should be resolved by this Court determining that a debtor must act to assume a collective bargaining agreement with bankruptcy court approval under Section 365 before pre-bankruptcy claims arising under the agreement are treated as administrative claims.

IV. THE FINDING OF THE COURT OF APPEALS WILL UNDERMINE REORGANIZING EMPLOYERS AND FAVOR UNION OVER NON-UNION EMPLOYEES.

The issues presented in *Adventure* have a significant impact on the administration of bankruptcy cases. In a case where a debtor is successful in reorganizing, the assumption and payment in full of all collective bargaining obligations seems well founded. The debtor could seek to assume the agreement under Section 365(a) and other pre-bankruptcy creditors could participate in a hearing to protect their interests in the event payment of

their claims was adversely affected by such an assumption. On the other hand, when a business in reorganization fails, the simple fact that a pre-petition claim is related to a collective bargaining agreement should not allow that claim to come ahead of all other pre-petition creditors based upon a mythical assumption of the agreement. Consumer creditors, taxing authorities and non-union employees holding pre-petition claims all suffer under such an inequitable result. While their claims are elevated in priority under Section 507(a)(3)-(8), the *Adventure* decision provides that these claims can only receive payment, if there are sufficient funds in the bankruptcy to pay the administrative claims of the collective bargaining employees and plans in full.

As noted by the Third Circuit in *Roth*, having an unknown amount of pre-petition obligations automatically becoming equal to new post-petition credit in a bankruptcy could be detrimental to a reorganization case. The *Roth* court stated that "[i]f post-petition administrative expenses can be, in effect, wiped out by pre-petition employment obligations, a strong disincentive to reorganization under Chapter 11 would be created". *Roth* at 956, quoting *In re Ohio Corrugating Co.*, 115 B.R. 572, 578 (Bankr. N.D. Ohio 1990). The application of the *Adventure* position would hamper the reorganization efforts of chapter 11 debtors with collective bargaining agreements since the debtors would be less likely to obtain new credit.

Adventure creates a further disparity in the treatment of union and non-union wage and benefit claims. The pre-petition claims of all employees or their benefit plans

for wages or contributions are treated as pre-petition claims under Section 507(a)(3) or (4) with a payment priority after administrative claims. On the other hand, *Adventure* provides union employees and benefit plans administrative claims for pre-petition claims ahead of non-union employees and plans, where there is no court approved rejection of the collective bargaining agreement. There is no statutory support or rational basis to suggest that Congress intended to grant such a special claim priority to union claimants by enacting Sections 1113 to the detriment of other employees and benefit plans of a bankruptcy debtor. The disparity created by *Adventure* should be resolved by the Court following the plain language of the Bankruptcy Code.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 23, 1998

APPENDIX A

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ADVENTURE RESOURCES, INCORPORATED, a West Virginia corporation; AMIGO SMOKELESS COAL COMPANY, a West Virginia corporation; TOMMY CREEK COAL COMPANY, a West Virginia corporation; GREEN MOUNTAIN ENERGY, INCORPORATED, a West Virginia corporation; M.A.E. SERVICES, INCORPORATED, a West Virginia corporation; MABEN ENERGY CORPORATION, a West Virginia corporation; RALEIGH LEASING, INCORPORATED, a West Virginia corporation; STONEY COAL COMPANY, a West Virginia corporation; SPRUCE LAUREL COAL COMPANY, a West Virginia corporation; HAWLEY COAL MINING CORPORATION, a West Virginia corporation; BICKFORD MINING, INCORPORATED, also known as Allports Coals, Incorporated, a West Virginia corporation; BARRETT FUEL CORPORATION, successor by merger to Beckley Lick Run Company, a West Virginia corporation; EAST GULF FUEL CORPORATION, a West Virginia corporation; COAL X EQUIPMENT & SUPPLY COMPANY, INCORPORATED, formerly known as Lakeside Supply Company, Incorporated, a West Virginia corporation; BECKLEY REPAIR & HYDRAULIC SERVICE, INCORPORATED, a	)	No. 96-1557

West Virginia corporation; Halfway, Incorporated, a West Virginia corporation; CHESAPEAKE LEASING, INCORPORATED, a West Virginia corporation; PINEY FUEL CORPORATION, a West Virginia corporation; LAKESIDE LEASING, Incorporated, formerly known as Airplane Leasing, Incorporated, a West Virginia corporation; RALEIGH SERVICES, INCORPORATED, a West Virginia corporation; ATLAS COAL LEASING, INCORPORATED, a West Virginia corporation; SUGAR CAMP MINING, INCORPORATED, a West Virginia corporation; H.D. ENTERPRISES, LIMITED, a West Virginia corporation; Jet Coal Services, Incorporated, a West Virginia corporation; Microblack, Incorporated, a West Virginia corporation; DOVER COAL SALES, INCORPORATED, a West Virginia corporation; NO. 10 MINING, INCORPORATED, a West Virginia corporation; PANTHER RED ASH LAND COMPANY, INCORPORATED, a West Virginia corporation,

Plaintiffs-Appellees,

v.

MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, PAUL R. DEAN, Trustees of the UMWA 1950 Pension Trusts and UMWA 1974 Pension Trusts; UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST;

UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST; MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, THOMAS O.S. RAND, CARLTON R. SICKLES, and GAIL R. WILENSKY, WILLIAM P. HOBGOOD, Trustees Of The United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED FUND; MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS F. CONNORS and ROBERT D. WALLACE, Trustees of The UMWA 1992 Benefit Plan; UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS F. CONNORS, ELLIOT A. SEGAL, Trustees of The UMWA 1993 Benefit Plan; UNITED MINE WORKERS OF AMERICA 1993 BENEFIT PLAN; and MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, JOSEPH J. STAHL, II, Trustees of The UMWA Cash Deferred Savings Plan of 1988; UNITED MINE WORKERS OF AMERICA CASH DEFERRED SAVINGS PLAN OF 1988,

Defendants-Appellants,

and

DONNA E. SHALALA, Secretary, Department of Health & Human Services, Social Security Administration of the United States of America,

Defendant.

ADVENTURE RESOURCES, INCORPORATED, a West Virginia corporation,

Plaintiff-Appellant,

and

AMIGO SMOKELESS COAL COMPANY, A West Virginia Corporation; TOMMY CREEK COAL COMPANY, A West Virginia Corporation; GREEN MOUNTAIN ENERGY, INCORPORATED, a West Virginia corporation; M.A.E. SERVICES, INCORPORATED, a West Virginia corporation; MABEN ENERGY CORPORATION, a West Virginia Corporation; RALEIGH LEASING, INCORPORATED, a West Virginia Corporation; STONEY COAL COMPANY, a West Virginia corporation; SPRUCE LAUREL COAL COMPANY, a West Virginia corporation; HAWLEY COAL MINING CORPORATION, a West Virginia corporation; BICKFORD MINING, INCORPORATED, also known as Allports Coals, Incorporated, a West Virginia corporation; BARRETT FUEL CORPORATION, successor by merger to Beckley Lick Run Company, a West Virginia corporation; EAST GULF FUEL CORPORATION, a West Virginia corporation; COAL X EQUIPMENT & SUPPLY COMPANY, INCORPORATED, formerly known as Lakeside Supply Company, Incorporated, a West Virginia corporation; BECKLEY REPAIR & HYDRAULIC SERVICE, INCORPORATED, a

No. 96-1938

West Virginia corporation; HALFWAY, INCORPORATED, a West Virginia corporation; CHESAPEAKE LEASING, INCORPORATED, a West Virginia corporation; PINEY FUEL CORPORATION, a West Virginia corporation; LAKESIDE LEASING, INCORPORATED, formerly known as Airplane Leasing, Incorporated, a West Virginia corporation; RALEIGH SERVICES, INCORPORATED, a West Virginia corporation; ATLAS COAL LEASING, INCORPORATED, a West Virginia corporation; SUGAR CAMP MINING, INCORPORATED, a West Virginia corporation; H.D. ENTERPRISES, LIMITED, a West Virginia corporation; JET COAL SERVICES, INCORPORATED, a West Virginia corporation; MICROBLACK, INCORPORATED, a West Virginia corporation; DOVER COAL SALES, INCORPORATED, a West Virginia corporation; NO. 10 MINING, INCORPORATED, a West Virginia corporation; PANTHER RED ASH LAND COMPANY, INCORPORATED, a West Virginia corporation,

Plaintiffs,

v.

MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, PAUL R. DEAN, Trustees of the UMWA 1950 Pension Trusts and UMWA 1974 Pension Trusts; United Mine Workers of America 1974 Pension Trust; UNITED MINE WORKERS OF AMERICA

1950 PENSION TRUST; MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, THOMAS O.S. RAND, CARLTON R. SICKLES, and GAIL R. WILENSKY, WILLIAM P. HOBGOOD, Trustees of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED FUND; MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS F. CONNORS and ROBERT D. WALLACE, Trustees of the UMWA 1992 Benefit Plan; UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS F. CONNORS, ELLIOT A. SEGAL, Trustees of the UMWA 1993 Benefit Plan; UNITED MINE WORKERS OF AMERICA 1993 BENEFIT PLAN; and MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, JOSEPH J. STAHL, II, Trustees of the UMWA Cash Deferred Savings Plan of 1988; UNITED MINE WORKERS OF AMERICA CASH DEFERRED SAVINGS PLAN OF 1988,

Defendants-Appellees,

and

DONNA E. SHALALA, Secretary, Department of Health & Human Services, Social Security Administration of the United States of America,

Defendant.

Appeals from the United States District Court
for the Southern District of West Virginia,
at Charleston.
Charles H. Haden II, Chief District Judge.
(CA-94-858-2, BK-91-50509, AP-93-197)

Argued: August 13, 1997

Decided: February 27, 1998

Before RUSSELL,* Circuit Judge, HALL, Senior Circuit Judge, and MICHAEL, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded with instructions by published opinion. Senior Judge Hall wrote the opinion, in which Judge Russell and Senior Judge Michael joined.

COUNSEL

ARGUED: Jami Wintz McKeon, Morgan, Lewis & Bockius, L.L.P., Philadelphia, PA, for Appellants. John Allen Rollins, Lewis, Friedberg, Glasser, Casey & Rollins, Charleston, WV, for Appellees. **ON BRIEF:** David W. Allen, Larry D. Newsome, Barbara Locklin-George, Brian H. Benjet, Office of the General Counsel, UMWA Health & Retirement Funds, Washington, DC; Marilyn L. Baker, Mooney, Green, Baker, Gibson & Saindon, P.C., Washington, DC, for Appellants.

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* Judge Russell participated in the decision of this case, but died prior to the time the opinion was issued. The opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

OPINION

HALL, Senior Circuit Judge:

The primary question before us in this appeal is whether a debtor in bankruptcy operating under the aegis of Chapter 11 may, with regard to an executory contract in effect at the time of the filing of the petition for reorganization, continue to reap the benefits of its bargain without concern that the non-debtor party will be made whole for the debtor's unfulfilled prepetition obligations. We hold, in accordance with the pronouncement of the Supreme Court in *NLRB v. Bildisco & Bildisco*, that it may not.

I.

A.

The Adventure Group comprises forty-six companies, all of which are affiliates or subsidiaries of Adventure Resources, Inc. The Adventure companies are involved, to varying degrees, in nearly every aspect of the production of coal. For instance, certain of the companies merely own or lease the mine properties and the coal beneath them. Other Adventure companies actually mine and prepare the coal, and still others provide support services such as supplies and equipment.

In December 1992, twenty of the Adventure companies filed petitions for reorganization under Chapter 11 of the Bankruptcy Code. Among the myriad of Adventure's creditors were six trusts established to provide pension, health, disability, and death benefits to members

of the United Mine Workers of America and their dependents. Together, these trusts constitute the UMWA Health and Retirement Funds ("the Funds").

Four of the trusts (the 1950 Pension Trust, the 1974 Pension Trust, the Cash Deferred Savings Plan of 1988, and the 1993 Benefit Plan) were created as the result of NBCWAs – collective bargaining agreements negotiated by the UMWA with the Bituminous Coal Operators Association.[1] The remaining two trusts (the Combined Benefit Fund and the 1992 Benefit Plan) exist by operation of law; they were established as a result of the enactment of the Coal Industry Retiree Health Benefit Act, 26 U.S.C. §§ 9701-9722 (the "Coal Act").

Adventure was among the coal operator signatories to the NBCWA of 1988, the collective bargaining agreement in effect at the time of the bankruptcy filing. Pursuant to the 1988 agreement, the employers undertook to ensure the funding of employee pension and health benefits initially payable during the contract term. In addition, the employers guaranteed the funding of benefits already being administered by the 1950 and 1974 Pension Trusts; those trusts were "incorporated by reference and made a part of this Agreement." NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1988 art. XX, §§ (b), (c)(1).

Adventure did not live up to its part of the bargain. Instead, as evidenced by the preliminary report of an

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[1] NBCWA is an abbreviation for "National Bituminous Coal Wage Agreement."

independent business analysis prepared in 1988, Adventure engaged in a deliberate strategy of expanding its mining operations at the expense of its employees:

> In 1985 and a portion of 1986, the companies began extensive mine development. . . . [M]ine development and sustaining capital costs are not easily financed, and management was faced with significant cash obligations. Management felt that expanding vendor credit beyond the level being used at the time was impossible and sought other sources of funds. The decision was made to not make payments, as due, to the mineworkers pension and benefit funds. . . . This "funding" mechanism was viewed as short-term but necessary, and the deferral of these payments was undertaken.

May 5, 1988, Preliminary Report of David A. Harrah, CPA, to John P. Lamond, Treasurer, Westmoreland Coal Co.

Adventure's "deferral" of its pension and health benefit contributions was anything but short-term. Once it had initially defaulted on its payments to the Funds, Adventure continued to remain in arrears. Even after filing for reorganization, Adventure satisfied neither its ongoing obligations to the 1950 and 1974 Pension Trusts, nor those subsequently imposed by the Coal Act and the 1993 NBCWA.[2] As a result of Adventure's business

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[2] To comply with the Coal Act, Adventure was required to make payments to the Combined Benefit Fund and to the 1992 Benefit Plan (the "Coal Act trusts"). Consistent with the terms of the 1993 NBCWA, Adventure agreed to contribute to the Cash Deferred Savings Plan of 1988 and to the 1993 Benefit Plan.

" 'funding' mechanism," the Funds' claims may exceed $25 *million, including approximately* $4-5 *million* assessed during the 43-month duration of the Chapter 11 bankruptcy.[3]

B.

The twenty Adventure companies in Chapter 11, joined by eight non-debtor affiliates, filed this adversary proceeding in the bankruptcy court to determine the viability and priority of the claims filed by three of the trusts. *See* 28 U.S.C. § 157(b)(1) (conferring jurisdiction upon the bankruptcy judges over certain "core" bankruptcy proceedings, as outlined in § 157(b)(2)). By order dated June 23, 1994, the district court, pursuant to its authority under 28 U.S.C. § 157(d), withdrew its reference of the proceeding to the bankruptcy court. The remaining three trusts were subsequently granted leave to intervene as additional defendants and to file a counter-complaint against Adventure.

Following a period of discovery, the Funds moved for partial summary judgment, contending that virtually all of their claims were entitled to be designated administrative expenses of the bankruptcy estate. *See* 11 U.S.C. § 507(a)(1) (according first priority to "administrative expenses allowed under section 503(b) of this title").[4] The

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[3] On July 25, 1996, after the notice of appeal was filed in the instant matter, the bankruptcy court, upon Adventure's motion, converted the case to a liquidation proceeding under Chapter 7.

[4] Adventure's creditors have filed over $160 million in claims relating to its pre-bankruptcy operations. During the oral

district court, by memorandum opinion and order dated March 8, 1996, granted the motion as to the claims filed by the Coal Act trusts. *See* note 2, *supra*. However, with respect to the vast bulk of the Funds' claims, *i.e.*, the pre-bankruptcy amounts owed by Adventure to the 1950 and 1974 Pension Trusts, the court below denied the motion. *Adventure Resources, Inc. v. Holland*, 193 B.R. 787 (S.D.W. Va. 1996).[5]

The district court concluded that the Funds' claims pursuant to the Coal Act did not accrue until after the filing of the Chapter 11 petitions in late 1992. The initial contributions and benefit premiums exacted by the terms of the Coal Act are, the district court ruled, taxes on the bankruptcy estates, and are therefore administrative expenses within the contemplation of 11 U.S.C. § 503(b)(1)(B)(i). 193 B.R. at 793-96.

Regarding Adventure's obligations to the 1950 and 1974 Pension Trusts, the district court dismissed the Funds' arguments that 11 U.S.C. §§ 1113(f) and 1114(e) (addressing, respectively, the rejection in bankruptcy of

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argument of this matter, counsel for the Chapter 7 trustee surmised that the sale of the estate's assets will generate only enough cash to pay the secured claims, the costs of the liquidation, and an unspecified portion of the expenses associated with the administration of the Chapter 11 bankruptcy.

[5] The parties do not appear to dispute that the claims filed by the 1993 Benefit Plan and the Cash Deferred Savings Plan of 1988, to the extent that they are attributable to obligations assumed by Adventure pursuant to its 1993 wage agreement, *see* note 2, *supra*, are entitled to priority as postpetition administrative expenses of the bankruptcy estates.

collective bargaining agreements and the payment of certain health insurance benefits to retired employees of Chapter 11 debtors) conferred first priority status upon the entirety of those claims, regardless of whether they accrued prior to the filing of the petitions. The district court determined instead that any claims for benefit contributions payable pursuant to an NBCWA were entitled to administrative expense priority only insofar as they had initially arisen postpetition. 193 B.R. at 796-98.

The Funds appeal that portion of the district court's order denying them summary judgment as to the claims of the Pension Trusts originating prior to Adventure's immersion in bankruptcy. The Chapter 7 trustee cross-appeals the remainder of the order granting summary judgment to the Funds on the Coal Act claims; the notice of crossappeal incorporates the district court's order of June 26, 1996, denying Adventure's post-proceeding motions for relief under Fed. R. Civ. P. 59(e) and 60(b).

We agree with the district court that the Funds' claims under the Coal Act did not arise until after Adventure had already filed its petitions for reorganization. Inasmuch as these claims are for unpaid taxes, they must be accorded administrative expense priority. Consequently, we affirm the district court's grant of summary judgment to the Funds as to the Coal Act claims.

The district court also correctly determined that the plain language of 11 U.S.C. §§ 1113(f) and 1114(e) does not accommodate the notion that Congress specifically intended to address through those statutes the priority of claims for unpaid pension benefit obligations. In the absence of specific direction from the legislative branch,

we conclude that, where such claims emanate from the breach of a collective bargaining agreement, they are to be granted priority in accordance with the law governing the treatment in bankruptcy of executory contracts in general.

Thus, where the Chapter 11 debtor has assumed the benefits and obligations of an existing collective bargaining agreement, but does not comply with its statutory duty to cure all defaults then extant, any claims arising from the debtor's failure to cure are entitled to first priority as administrative expenses of the bankruptcy estate. Because the district court held to the contrary, *i.e.*, that the Funds' claims are not entitled to any priority to the extent that they are attributable to prepetition defaults, we reverse its grant of summary judgment to Adventure as to the applicable Pension Trust claims. We will explain the reasons for our holdings in more detail below.

II.

The parties agree that no genuine issue of material fact exists at this stage of the litigation. Our task is simply to determine, on the undisputed facts, which party is entitled to judgment as a matter of law concerning the issues on appeal. FED. R. CIV. P. 56(c). In that respect, our review of the district court's application of the law is, as always, *de novo*. *Patten v. United States*, 116 F.3d 1029, 1031 (4th Cir. 1997).

III.

A.

Congress passed the Coal Act to redress the "looming insolvency" of the trusts that had been established by prior NBCWAs to provide health care benefits to retired coal miners. *LTV Steel Co., Inc. v. Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478, 484-85 (2d Cir. 1995). To that end, the Act created the Combined Benefit Fund to secure the continuation of health benefits for those retired miners who had been receiving them under the old system as of July 20, 1992. 26 U.S.C. § 9703(f). The Act also devised the 1992 Benefit Plan, which covered two other groups of miners: (1) those eligible for benefits as of February 1, 1993, and who retired by September 30, 1994; and (2) those "orphaned" upon the insolvency of an individual employer benefit plan. § 9712(b).

With regard to both new trusts, the Coal Act assessed initial, "prefunding" contributions against the coal operators who had signed the 1988 NBCWA. *See* §§ 9704(i) (Combined Fund), 9712(d)(1)(A) (1992 Plan). The Act also specified that, beginning on February 1, 1993, the affected operators would pay health benefit premiums to the trusts, based on the number of beneficiaries assigned to them by the Social Security Administration. *See* §§ 9704(b) (Combined Fund), 9712(d)(1)(B) (1992 Plan). Lastly, the Act required the operators to pay additional premiums to the Combined Fund to provide death benefits for their employees and to ensure health coverage for the industry's unassigned beneficiaries. § 9704(c), (d).

B.

Section 503 of the Bankruptcy Code provides for the payment of expenses incurred in administering the bankruptcy estate. Allowable administrative expenses commonly include the direct costs of preserving the estate (for example, postpetition wages earned by the debtor's employees) and compensation for services rendered to the estate by professionals, such as attorneys and accountants. *See* 11 U.S.C. § 503(b)(1)(A), (4). We are more concerned at present, however, with that category of administrative expenses comprising "any tax . . . incurred by the estate[.]" § 503(b)(1)(B)(i).[6] Claims for taxes, like those for wages, professional fees, and other administrative expenses, are entitled to priority over all other unsecured claims. § 507(a)(1).

1.

The trustee contends that the assessments mandated by the Coal Act are not "taxes." The pertinent case authority is to the contrary. *See In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996) (Coal Act premiums are taxes whose validity may be determined in the federal

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[6] Section 503(b)(1)(B)(i) excepts from its reach "a tax of a kind specified in section 507(a)(8) of this title." The latter provision, in turn, addresses the priority accorded claims of "governmental units" for, *inter alia*, certain income, property, employment, and excise taxes. Regardless of how one might characterize the Funds' Coal Act claims within the broader rubric of "taxes," the Funds themselves are not governmental units, and, therefore, their claims are not within the ambit of § 507(a)(8). *Adventure Resources*, 193 B.R. at 795 n. 15. This aspect of the district court's ruling has not been challenged on appeal.

courts notwithstanding the asserted jurisdictional bars of the Anti-Injunction Act and the Declaratory Judgment Act), *cert. denied*, 117 S.Ct. 1251 (1997).

In *Leckie*, we recognized that Coal Act obligations "are involuntary pecuniary burdens imposed by Congress for the public purpose of restoring financial stability to coal miners' benefit plans,[7] and those burdens have been imposed as an exercise of Congress's taxing power." *Id.*, citing *Chateaugay* at 498.[8] There is no doubt, then, that the assessments meet this circuit's definition of a "tax."[9]

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[7] *Cf. New Neighborhoods, Inc. v. W. Va. Workers' Comp. Fund*, 886 F.2d 714, 718 (4th Cir. 1989) ("The 'public' purpose of systems such as the [workers' compensation scheme] in force and effect in West Virginia is to allocate the burden of the costs of injured employees and/or their dependents among employers rather than among the general public.").

[8] The court in *Chateaugay* was faced with the precise issue before us. The Second Circuit concluded that Coal Act assessments are taxes within the meaning of § 503(b)(1)(B)(i), entitled to administrative expense priority under § 507(a)(1).

[9] *See United States v. City of Huntington, W. Va.*, 999 F.2d 71, 73 n. 4 (4th Cir. 1993):

> For the purpose of determining claim priority in the context of bankruptcy, the courts have established the following elements of a tax: "(a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) Imposed by, or under authority of the legislature; (c) for public purposes, including the purpose of defraying expenses of government of undertakings authorized by it; and (d) Under the police or taxing power of the state."

(quoting *In re Lorber Industries*, 675 F.2d 1062, 1066 (9th Cir. 1982)).

2.

Remaining is the question of whether the taxes levied by the Coal Act were, in the case of the Adventure companies, "incurred by the estate[s]." The trustee argues in the negative, pointing out that the Coal Act was signed into law on October 24, 1992, antedating the filing of the bankruptcy petitions by more than a month. Under the terms of the statute, however, no claim could accrue to the Combined Fund and the 1992 Plan until February 1, 1993, well after the bankruptcy estates had been created.[10]

A "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" 11 U.S.C.A. § 101(5)(A) (West 1993). Claims, however, do not exist in a vacuum; they must be possessed by creditors. *See* § 101(10) ("creditor" defined as, *inter alia*, an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor").

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[10] *See* 26 U.S.C.A. § 9702(c) ("The first plan year of the Combined Fund shall begin February 1, 1993. . . . ") *and* 26 U.S.C.A. § 9712(b)(2) ("[T]he term 'eligible beneficiary' means an individual who . . . but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993[.]") (West Supp. 1997); *In re CF & I Fabricators of Utah, Inc.*, 169 B.R. 984, 987 (D.Utah 1994) ("[S]ection 9702 of the Coal Act establishes the Combined Fund and merges the UMWA 1950 and 1974 Benefit Plans into the Combined Fund effective February 1, 1993. . . . [S]ection 9712 of the Coal Act establishes the 1992 Benefit Plan, which also became effective on February 1, 1993.").

Neither the Combined Fund nor the 1992 Plan were capable of being anyone's creditor until at least February 1, 1993, the earliest date on which the trusts could have been entitled to collect their first premiums. *See* note 10, *supra;* 26 U.S.C.A. § 9704(a) (West Supp. 1997) ("Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium[.]"). Consequently, the entirety of the Coal Act claims filed against Adventure by these two trusts must necessarily have arisen postpetition.[11] We therefore affirm the district court's determination that those claims be accorded administrative expense priority as taxes incurred by the estates.[12]

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[11] We speculated in *Leckie* that a debtor's liability for future Coal Act premiums may attach prior to the filing of the bankruptcy petition, inviting the conclusion that a trust's entitlement to such premiums constitutes a prepetition claim. 99 F.3d at 580-81 & n. 9; *In re Westmoreland Coal Co.*, 213 B.R. 1, 12 (Bankr. D.Colo. 1997) ("[T]he Fourth Circuit [in *Leckie*] concluded that Coal Act obligations fell within the bankruptcy definition of a claim and characterized future premium obligations under § 9712 as unmatured and contingent rights[.]"). In *Leckie*, however, none of the eight debtors filed for bankruptcy prior to February 1, 1993, the date that the trusts' creditor status was effectively established. *See* 99 F.3d at 577 n. 3, 578 n. 6 (first petition filed on April 16, 1993).

[12] The Funds have argued alternatively that the Coal Act claims should be accorded first priority status by virtue of 11 U.S.C. § 1114(e), which provides, in pertinent part:

> (1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee . . . shall timely pay and shall not modify *any* retiree benefits, except [by court order after notice and a hearing, or as the parties may agree]. . . .

IV.

The final matter on appeal involves the Pension Trust claims, the lion's share of which the district court deemed ineligible for priority status as having initially accrued prior to the filing of the bankruptcy petitions. The Funds assert that the district court's ruling was in error, relying primarily on 11 U.S.C. §§ 1113 and 1114, enacted by Congress during the 1980s in response to a perceived threat to labor stability and to retiree health benefits posed by the bankruptcy reorganization of numerous large employers.

A.

Section 1114 simply has no application to the claims of the Pension Trusts. Although it commands that the trustee or debtor-in-possession pay "any" retiree benefits as an administrative expense of the bankruptcy estate, *see* § 1114(e) *and* note 12 *supra*, the term "retiree benefits" is limited to

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> (2) *Any* payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an *allowed administrative expense* as provided in section 503 of this title.

(emphases supplied). The trustee contends (and the district court held) that § 1114(e) applies only to benefit payments due after the filing of the bankruptcy petition. The Funds respond forcefully that the word "any" in paragraphs (1) and (2) encompasses both pre- and postpetition payments. Inasmuch as we have already decided that all of the Coal Act claims arose postpetition, we leave for another day the task of ascertaining the scope of § 1114(e).

> payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, *for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death* under any plan, fund, or program . . . maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

11 U.S.C.A. § 1114(a) (West 1993) (emphasis supplied). True to their designations, the Pension Trusts administer only *pension* benefits for retired coal miners. None of their claims are for the types of benefits enumerated in § 1114(a).

B.

1.

Section 1113, by contrast, affects the treatment of pension benefits in bankruptcy to the extent that those benefits exist pursuant to a collective bargaining agreement. The statute provides that a Chapter 11 debtor (or trustee) may reject a collective bargaining agreement "only in accordance with the provisions of this section." 11 U.S.C.A. § 1113(a) (West 1993).[13] The whole of the

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[13] If the debtor believes that its obligations under a collective bargaining agreement would inhibit its effective reorganization, it must first make a good-faith effort to negotiate a modification of the contract with its employees' authorized representative. § 1113(b). In the event of an impasse, the bankruptcy court may, after notice and a hearing, permit the debtor to reject the collective bargaining agreement only if (1) the debtor's proposed modifications are "necessary to permit

agreement is protected, as are its components: "No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." § 1113(f).

The parties acknowledge that, during the course of its attempted reorganization, Adventure never sought to reject or modify its labor agreement with the UMWA in accordance with § 1113; it merely continued to breach its contractual obligation to pay the premiums due the Pension Trusts. The Funds maintain that Adventure's breach, in essence, unilaterally altered the pension contribution provision of the 1988 NBCWA, in contravention of § 1113(f). According to the Funds, the only means of giving full force and effect to the statute is to compensate the Pension Trusts for the breach by granting all of their claims for unpaid premiums priority in distribution from the bankruptcy estates.

The Funds' position finds some support in the holding of *In re Unimet Corp.*, 842 F.2d 879, 884 (6th Cir. 1988). In that case, the court of appeals opined that § 1113(f)'s "unequivocal" prohibition against the modification of collective bargaining agreements means that a debtor in Chapter 11 "cannot escape its obligations in [that] regard." *Id.* Unimet was therefore ordered to continue

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the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably"; (2) the employees' authorized representative has, without good cause, refused to accept the debtor's proposal; and (3) the balance of the equities clearly favors rejection of the collective bargaining agreement. § 1113(c).

paying health and life insurance premiums on behalf of its retirees, pursuant to its prepetition agreement with the steelworkers' union.

We agree that the language employed by Congress in § 1113 is unequivocal, insofar as it goes. It plainly imposes a legal duty on the debtor to honor the terms of a collective bargaining agreement, at least until that agreement is properly rejected. By implication, the statute creates a claim on behalf of the debtor's employees in the event that the debtor fails to comply with the law.

Section 1113, however, offers no advice as to how this new category of claims should be treated *vis a vis* other categories competing for payment. The statute's silence stands in stark contrast to § 1114, *see* Section IV-A *supra*, which clearly states that "[a]ny payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense[.]" 11 U.S.C.A. § 1114(e)(2) (West 1993).

The *Unimet* court explicitly declined to decide whether benefit premiums payable under § 1113 are administrative expenses, deeming resolution of the issue immaterial to its conclusion that the premiums had to be paid. 842 F.2d at 884. To the extent that the Sixth Circuit's rationale has been followed by the lower courts, a so-called "superpriority" has attached to claims within the purview of § 1113. *E.g., Eagle, Inc. v. Local No. 537 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Indus. of United States and Canada, AFL-CIO*, 198 B.R. 637, 638-39 (D.Mass. 1996).

The obvious difficulty with the approach taken in *Unimet* and its progeny is that it engenders disharmony between § 1113 and the carefully ordered hierarchy of priorities embodied in § 507. "Section 507 is intended to be the exclusive list of priorities in bankruptcy. Priorities are to be fixed by Congress. Courts are not free to fashion their own rules of superpriorities or subpriorities within any given priority class." 3 LAWRENCE P. KINGET ET AL., COLLIER ON BANKRUPTCY ¶ 507.02[2] (15th ed. 1996), *cited in In re Ionosphere Clubs, Inc.*, 22 F.3d 403, 408 (2d Cir. 1994) (*Ionosphere II*).

The Second and Third Circuits have both observed that, on those infrequent occasions where Congress has intended to supersede the general priority scheme set forth in § 507, it has done so explicitly. *See Ionosphere II* at 408 (citing § 1114(e)(2)'s allowance of claims for retiree benefits as administrative expenses); *In re Roth American, Inc.*, 975 F.2d 949, 956 (3d Cir. 1992) (citing § 364(c)(1)'s authorization for the bankruptcy court to accord "priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title" to credit obtained or debt incurred for the purpose of operating the debtor's business). As we have noted, explicit instruction from Congress concerning the priority of claims under § 1113 is conspicuously absent from the statute. "[T]here is no indication either from the language or the legislative history of section 1113 that Congress intended to address the priority to be given claims based on a collective bargaining agreement." *Roth American* at 956.

We believe that, to the extent possible, Sections 507 and 1113 must be construed harmoniously. It is imperative to the orderly administration of the bankruptcy process that § 507 remains, unless otherwise clearly specified by Congress, the final word on the priorities of competing claims. We can faithfully adhere to that principle in this case without doing violence to the legislative purpose inherent in § 1113:

> Section 507 only establishes the priority of [§ 1113] claims[;] it does not affect the underlying obligation. . . . Judicial ordering of benefit claims pursuant to § 507 is not equivalent to employer avoidance of obligations under a collective bargaining agreement. The collective bargaining agreement is respected, but the financial obligations issuing from it are accorded priority consistent with the Bankruptcy Code.

Ionosphere II at 407 (citation and quotation marks omitted); *see Roth American* at 957 ("The congressional goal embodied in section 1113 to give special consideration to a collective bargaining agreement and encourage the debtor and the union to reach a mutually acceptable agreement . . . can be satisfied without interfering with the previously established statutory priorities.").

2.

We conclude that a bankruptcy claim arising from the breach of a collective bargaining agreement may be accorded priority status only insofar as it fits into one of the categories singled out for preferential treatment in § 507. Fortunately for the Funds, the claims of the Pension Trusts are the proverbial round peg.

i.

We begin with the unremarkable premise that unexpired collective bargaining agreements are executory contracts. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521-22 (1984).[14] Their treatment in bankruptcy is, therefore, governed generally by 11 U.S.C. § 365, pertaining to executory contracts and unexpired leases entered into by the debtor prior to the filing of the bankruptcy petition. *Id.* at 522-23.

In *Bildisco*, the Supreme Court held that a debtor attempting a Chapter 11 reorganization may reject a collective bargaining agreement that "burdens the estate," provided that "after careful scrutiny" the equities balance in favor of rejection. *Id.* at 525-26; *see* 11 U.S.C. § 365(a) (stating that the trustee "may assume or reject any executory contract or unexpired lease of the debtor"). It was precisely this holding that inspired Congress's almost immediate enactment of § 1113 "to preclude employers from using bankruptcy law as an offensive weapon in labor relations by going into bankruptcy and unilaterally rejecting or modifying the extant collective bargaining agreement (or exerting leverage at the bargaining table

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[14] Upon examining the legislative history of the relevant portion of the Bankruptcy Code, the Supreme Court ascertained that Congress intended the term "executory contract" to describe those contracts "on which performance is due to some extent on both sides." *Bildisco* at 522 n. 6 (quoting H.R.Rep. No. 95-595, at 347 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6303). Collective bargaining agreements typically impose reciprocal obligations on the employer and the union, on which performance is due at all times for the duration of the contract.

by threatening to do so)." *Roth American* at 956 (citation omitted).

However, in erecting § 1113's substantive and procedural obstacles to the unilateral rejection of collective bargaining agreements, Congress did not indicate that it intended to otherwise restrict the general application of § 365 to those agreements. Section 1113 "governs only the conditions under which a debtor may modify or reject a collective bargaining agreement[.]" *Id.* (quoting *In re Ohio Corrugating Co.*, 115 B.R. 572, 578 (Bankr. N.D.Ohio 1990), *rev'd*,[15] *United Steelworkers of America, AFL-CIO v. Ohio Corrugating Co.*, No. 4:90CV0810, 1991 WL 213850 (N.D.Ohio Jan. 3, 1991)).

Thus, § 365 continues to apply to collective bargaining agreements, except where such an application would create an irreconcilable conflict with § 1113. *Mass. Air Conditioning & Heating Corp. v. McCoy*, 196 B.R. 659, 663 (D.Mass. 1996) ("Section 1113 is designed to provide additional procedural requirements for rejection or modification of collective bargaining agreements, and only to that degree supersedes and supplements the provisions in § 365.") (citing *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 136 n. 2 (1991) (Stevens, J., dissenting)). The essential character of collective bargaining agreements as executory contracts, made plain in *Bildisco*, was left undisturbed by Congress.

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[15] The bankruptcy court's denial of priority status to the union's claims for wages and benefits in *Ohio Corrugating* was summarily reversed by the district court as inconsistent with the Sixth Circuit's interpretation of § 1113 in *Unimet*.

ii.

The collective bargaining agreement between the UMWA and Adventure was assumed in bankruptcy as the result of the latter's failure to reject it in accordance with § 1113. *Roth American* at 957. Where the debtor-in-possession assumes an executory contract, "it assumes the contract *cum onere* [.]" *Bildisco* at 531 (citation omitted).[16] That the obligations of an executory contract be accepted along with its benefits is made plain by the Bankruptcy Code's requirement that, as conditions of the contract's assumption, the debtor cure any existing default and compensate all non-debtor parties for actual pecuniary losses that have resulted therefrom. *See* § 365(b)(1).

Upon assumption of the contract, "the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate." *Bildisco* at 532; *In re Stewart Foods, Inc.*, 64 F.3d 141, 145 (4th Cir. 1995).[17] There can be no doubt, of course, that the statutory duty to cure any existing default is a "liability" incurred by the debtor by virtue of its assumption in bankruptcy of an executory contract.

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[16] "What is taken *cum onere* is taken subject to an existing burden or charge." BLACK'S LAW DICTIONARY 342 (5th ed. 1979).

[17] If the contract is instead rejected, the resulting damages (including any prepetition breach) constitute general, unsecured claims against the estate. *Bildisco* at 531; *see Stewart Foods* at 144-45 ("[R]egardless of the nature of the contract, if at the time of the bankruptcy filing the debtor has an obligation under the contract to pay money to the non-debtor party, that obligation is handled as a pre-petition claim in the bankruptcy proceedings.").

Hence, when Adventure assumed the collective bargaining agreement, it undertook a legal obligation to cure its existing defaults under that agreement, including the arrears to the Pension Trusts. Adventure's failure to comply with its legal obligation gave rise, under *Bildisco* and *Stewart Foods*, to an administrative expense claim on behalf of the Pension Trusts for the entirety of the arrearage. In effect, Adventure's postpetition assumption of its executory labor contract with the UMWA transformed the prepetition claims of the Pension Trusts, once not cured, into new claims arising postpetition. *In re Mushroom Transp. Co., Inc.*, 78 B.R. 754, 759 (Bankr. E.D.Pa. 1987).[18]

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[18] We tread no new ground in holding that prepetition defaults of executory contracts and leases assumed in bankruptcy, left uncured, constitute postpetition administrative expenses of the estate. A number of learned colleagues and commentators have blazed that trail before us. *See, e.g., LJC Corp. v. Boyle*, 768 F.2d 1489, 1494 n. 6 (D.C. Cir. 1985); *Mass. Air Conditioning & Heating*, 196 B.R. at 663; *In re Moline Corp.*, 144 B.R. 75, 79 (Bankr. N.D.Ill. 1992); *In re French*, 131 B.R. 138, 141 (Bankr. E.D. Mo. 1991); *In re Leon's Casuals Co., Inc.*, 122 B.R. 768, 771 (Bankr. S.D. Ala. 1990); *In re Monroe Well Serv., Inc.*, 83 B.R. 317, 321 (Bankr. E.D. Pa. 1988); *Mushroom*, 78 B.R. at 759; 2 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY ¶ 365.08[1] (15th ed. 1996) ("[A] trustee must proceed cautiously in electing whether to assume or reject [an executory contract] since an assumption will have the effect of making the expenses and liabilities incurred expenses of administration."); Jesse M. Fried, *Executory Contracts and Performance Decisions in Bankruptcy*, 46 DUKE L.J. 517, 525 (1996):

> If the trustee "assumes" the [executory] contract, Section 365 binds the bankruptcy estate to the contract, permitting the estate to seek performance from the other party under the contract's original

We conclude that the district court erred as a matter of law by declining to accord administrative expense priority to the Pension Trust claims insofar as the arrearage they represent initially accrued prior to the filing of the bankruptcy petitions. We therefore reverse its grant of summary judgment to Adventure as to those claims.

V.

We affirm the district court's orders of March 8, 1996, and June 26, 1996, granting summary judgment to the Funds regarding the priority classification of the Coal Act claims. We reverse the district court's order of March 8, 1996, to the extent that it granted summary judgment to Adventure regarding the priority classification of the Pension Trust claims. We remand the matter to the district court with instructions to enter summary judgment for the Funds as to the Pension Trust claims, according them administrative expense priority.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

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terms. [O]bligations in connection with assumed contracts . . . are treated as postpetition administration claims. . . . Thus, the effect of assumption is that the estate acquires all of the debtor's rights *and* obligations under the contract.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

ADVENTURE RESOURCES, INC., et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 2:94-0858

MICHAEL H. HOLLAND, et al.,

Defendants.

AND

MICHAEL H. HOLLAND, et al.,

Intervenor Counter-Plaintiff Trusts,

vs.

ADVENTURE RESOURCES, INC., et al.,

Counter-Defendants.

MEMORANDUM OPINION AND ORDER

Pending is the motion for partial summary judgment of the Defendant/Intervenor Counter-Plaintiffs (the Funds).[1] For the reasons set forth below, the Court **GRANTS** in part and **DENIES** in part the Funds' motion.

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[1] The Funds is a shorthand reference to the UMWA Health and Retirement Funds. The Funds consists of six trusts: (1) the UMWA 1950 Pension Trust; (2) the 1974 Pension Trust; (3) the Cash Deferred Savings Plan of 1988; (4) the UMWA Combined Benefit Fund (Combined Fund); (5) the UMWA 1992 Benefit Plan (1992 Plan); and (6) the UMWA 1993 Benefit Plan. The first three trusts are referred to collectively as the "Pension Plans."

I. INTRODUCTION

The substance of this adversary proceeding raises complicated issues under the Coal Act, the Bankruptcy Code and the parties' collective bargaining agreements. Accordingly, it is helpful to provide some background on these statutes and contracts.

An exhaustive treatment of the Coal Act is unnecessary. The Act's details and the history leading to its enactment can be found elsewhere. *See, e.g., Carbon Fuel Co. v. USX Corp.*, 891 F. Supp. 1186, 1189-92 (S.D. W. Va. 1995) (Haden, C.J.), *appeal pending*, No. 95-2496 (4th Cir. Aug. 9, 1995). Only a general outline of the Coal Act is necessary to provide a frame of reference for some of the arguments asserted by the Funds.

The Coal Act was enacted on October 24, 1992 and became effective February 1, 1993. *In re Chateaugay Corp.*, 53 F.3d 478, 486 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). The Coal Act contains three mechanisms for the provision of health care benefits to retired miners. First, the Act continues the Individual Employer Plans (IEPs) created

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The Pension Plans were established under a series of National Bituminous Coal Wage Agreements (NBCWAs) to provide pensions, retirement savings opportunities and death benefits to retired coal miners and their surviving spouses. The Combined Fund and the 1992 Plan were established in accordance with the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act" or the "Act"), 26 U.S.C. §§ 9701 *et seq.* to provide retiree health benefits to two specific sets of beneficiaries. The 1993 Benefit Plan was established by the most recent NBCWA and provides retiree health benefits to a third set of beneficiaries under separate eligibility rules.

pursuant to the 1978 NBCWA and maintained by the successor NBCWAs.[2] *See* 26 U.S.C. § 9711(a).

The other two mechanisms are the Combined Fund and the 1992 Plan, which are financed in large part through per beneficiary premiums payable by companies to whom responsibility is attributed for individual beneficiaries of those plans. *See* 26 U.S.C. §§ 9702(a)(1), 9712(a)(1), 9704(b)(2), 9712(d)(1)(B). Each of these alternative multiemployer plans is discussed in more detail below.

The Combined Fund covers beneficiaries eligible for and receiving benefits from the UMWA 1974 Benefit Plan and the 1950 Benefit Plan as of July 20, 1992. 26 U.S.C. § 9703(e). These separate plans were merged into the Combined Fund effective February 1, 1993. 26 U.S.C. §§ 9702(a)(2). The Combined Fund is authorized to collect claims pre-existing the Act. 26 U.S.C. § 9708. Every coal operator who signed or otherwise became bound to an NBCWA at anytime is required to participate in the Combined Fund's financing. 26 U.S.C. § 9701(b), (c)(1); *Davon Inc. v. Shalala*, 75 F.3d 1114, 1117 (7th Cir. 1996). The premium scheme for the Combined Fund involves several

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[2] *Carbon Fuel* briefly explains the genesis of the IEP:

> In 1978, the UMWA and the BCOA negotiated a slightly different NBCWA. The new agreement partially dismantled the system developed in 1974. The union and operators agreed to shift from a centralized multiemployer benefit trust to a decentralized scheme in which each signatory operator established and financed its own individual health benefit delivery plan or . . . "IEP"[.]

Carbon Fuel, 891 F. Supp. at 1190.

coordinated mechanisms. The primary financing of the Combined Fund comes from per beneficiary premiums paid by "assigned operators" and their related persons under § 9704(a), based on the number of beneficiaries assigned to them by the Secretary of Health and Human Services according to an assignment process. *See generally* 26 U.S.C. § 9706. These premiums were to be calculated "for each plan year beginning on or after February 1, 1993. . . . " 26 U.S.C. § 9704(b)(2).

The 1992 Plan is essentially the new "orphan plan." The 1992 Plan is required to provide health coverage for certain individuals who are not receiving benefits from the Combined Fund or from their last signatory operator's § 9711 plan. 26 U.S.C. § 9712(b)(2); *see Holland v. Double G. Coal Co.*, 898 F. Supp. 351, 354 (S.D. W. Va. 1995) (stating the 1992 Plan was intended as a "backstop" to the Combined Fund and the IEP scheme).[3]

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[3] Section 9712(b)(2) sets forth the reach of coverage for the 1992 Plan in its definition of "eligible beneficiary," which is defined as an individual who

> (A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or
>
> (B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,
>
> and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992

The 1992 Plan enrolls beneficiaries upon determining they are eligible for coverage. The Coal Act imposes an ongoing duty on the last signatory operator and its related persons to pay annual prefunding premiums and monthly per-beneficiary premiums to the 1992 plan for every month the 1992 Plan provides health benefits to the operator's retirees. 26 U.S.C. § 9712(d)(1)(B).

There are also payment obligations associated with the applicable NBCWAs. In addition to Adventure's statutory obligations under the Act, it may be required to pay contributions under these wage agreements.[4]

UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

Id.

[4] Coal industry retirees have been promised pensions and health benefits under collective bargaining agreements dating back to 1947. *See generally Carbon Fuel*, 891 F. Supp. at 1189-91. The UMWA and the Bituminous Coal Operators Association established several multiemployer plans, including the UMWA 1950 Pension Trust, 1974 Pension Trust, the 1950 Benefit Plan, and the 1974 Benefit Plan. The 1993 NBCWA established the 1993 Benefit Plan to provide health benefits for certain retirees not covered by the Coal Act and requires employer contributions to the Cash Deferred Savings Plan of 1988 to defray the costs of administering the trust. While Congress, via ERISA, has sought to assure timely payment and streamlined collection of delinquent contributions to multiemployer pension plans, Adventure has often acted to the contrary. *See* Ex. 8 to Funds' Mot. for Partial Summ. Jgt., *Connors v. Adventure Resources, Inc.*, No. 5:90-0209 (S.D. W. Va. Nov. 8, 1991). The exhibits to the Funds' motion will hereafter be denominated "Ex. '[blank]'."

II. FACTUAL AND PROCEDURAL BACKGROUND

Given the facts are not disputed, the Court will summarize how this controversy developed.

H. Paul Kizer, the owner of the Adventure companies, started Maben Energy in 1971 and acquired an ownership interest in many of the Adventure companies in 1977. By the mid-1980s, the number of companies had proliferated. Nevertheless, all were consolidated under Kizer's sole ownership before bankruptcy. By the late 1980s, Adventure was touted as "the largest independent coal producer in West Virginia and the 49th largest independent coal producer in the United States." Ex. 25.

Unfortunately, the Adventure companies began to experience financial setbacks resulting in, *inter alia,* the December 1992 filing of petitions by twenty companies related to Adventure Resources, Inc., under Chapter 11 of the Bankruptcy Code. Proofs of claim for unpaid contributions and premiums were filed timely by the Funds. On December 14, 1993 Adventure[5] initiated this adversary proceeding by filing a complaint seeking disallowance of the Funds' claims.

There are over 500 beneficiaries for whom the Adventure companies are responsible, including retired

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[5] "Adventure" refers to the twenty Plaintiff Chapter 11 debtor companies as well as to eight to ten Plaintiff non-bankrupt affiliates. In all, there are 46 Adventure companies, some operating and some defunct. Various members of the group have been signatory to NBCWAs since 1974. Adventure is currently signatory to a 1993 NBCWA under the names of Maben Energy Corporation and a list of affiliates. *See* Ex. 2.

miners and eligible dependents.[6] Adventure has not paid per beneficiary premiums to the Combined Fund since December 1994. As of November 25, 1995 Adventure's delinquent Combined Fund premiums totalled over 1.2 million dollars, and currently accrue at a rate of over one hundred fifty thousand dollars ($150,000) per month. Adventure never has paid per beneficiary premiums to the 1992 Plan.[7] The 1992 Plan is owed over 1.7 million

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[6] The Funds acknowledge the precise numbers of attributable beneficiaries in the Combined Fund and the 1992 Plan go up or down as more beneficiaries are enrolled in the plans, leave the plans due to mortality or other circumstances, or as the Social Security Administration's assignments are adjusted.

[7] Adventure maintained for a good portion of this litigation that it was providing coverage to its retirees through a § 9711 plan. In reality, however, Adventure was merely processing claims through its self-insured plan. It eventually came to light that Adventure had been failing to pay timely its beneficiaries' medical bills and that health care providers were refusing to serve these beneficiaries. The following is an excerpt from an August 1995 letter to the Funds' counsel from the Chief Financial Officer of the Adventure Resources Group:

> In regard to your inquiry please be advised that employees, retired and active, which have filed claims under any of the Maben Energy Company-affiliated health care plans have not had any such claims funded after October 6, 1994. All active claims which entered the system after October 7, 1994 remain unpaid.

Ex. 5, letter from David A. Harrah, CPA, to Susan Cannon-Ryan (Aug. 29, 1995). The 1992 Plan stepped in after this cessation of coverage and determined Adventure's beneficiaries were not receiving § 9711 benefits from Adventure. Accordingly, Adventure's beneficiaries were enrolled in the 1992 Plan retroactively to the date coverage from Adventure's purported

dollars for per beneficiary premiums as of January 15, 1996, which continue to accrue at a rate of over seventy-three thousand dollars ($73,000) per month. Adventure also apparently failed to pay any pre-funding premiums, which also are included in the Funds' proofs of claim. These premiums accrue at a rate of one hundred twenty-one dollars ($121.00) *times* the number of eligible and potentially eligible 1992 Plan beneficiaries attributable to Adventure. Finally, Adventure has failed to pay any contributions under the applicable NBCWAs since January 1995 and has accrued an estimated four hundred thousand dollars ($400,000) in unpaid contributions since November 1995, which continue to accrue at a rate of over forty-two thousand dollars ($42,000) per month.

There are essentially two types of obligations at issue in this adversary proceeding: (1) monthly per beneficiary premiums owed under the Coal Act; and (2) monthly contributions owed under the applicable NBCWA. The Funds claim all of these obligations are Chapter 11 administrative expenses under various Bankruptcy Code provisions. There are two bases for the Funds' assertion.

First, the Funds assert the premiums accrued and accruing under the Coal Act are administrative expenses[8] because, in the alternative, (1) the premiums are a tax on the Debtors' estates under 11 U.S.C. § 503(b)(1)(B); and (2) the premiums are an actual, necessary expense of the

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§ 9711 plan ceased. Adventure then was billed for the 1992 Plan premiums.

[8] For the uninitiated, administrative expenses are payable by the trustee as a first priority expense under 11 U.S.C. 507(a)(1).

estates under 11 U.S.C. § 503(b)(1)(A). Second, the Funds assert the contributions accrued and accruing under the applicable NBCWA are administrative expenses (1) to the extent they accrued and are accruing post-petition; and (2) to the extent they accrued pre-petition, alternatively, under either 11 U.S.C. § 1113(f), dealing with rejection of collective bargaining agreements in bankruptcy, or 11 U.S.C. § 1114(e), dealing with the treatment of retiree benefits in bankruptcy.[9]

III. LAW AND ANALYSIS

A. *The Summary Judgment Standard:*

The well-settled standard governing the disposition of a motion for summary judgment recently was restated by our Court of Appeals:

> A moving party is entitled to summary judgment 'if the pleading[s], depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the

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[9] In its complaint, Adventure also challenged the Funds' claim for contingent benefit plan withdrawal liability. As noted by the Funds, however, "separate withdrawals giving rise to such a claim could only occur if the Adventure companies are not alter egos, joint employers or a single employer for purposes of this action . . . [and] entry of summary judgment on this issue in favor of the Funds would render the contingent claim moot." Funds Mem. in Supp. of Summ. Jgt. at 2 n.3; *see also* Funds Reply Mem. at 3 ("The Funds' contingent claim for benefit plan withdrawal liability is . . . moot."). Given the Court's favorable ruling for the Funds on the related person/alter ego/joint employer/single employer issue, *supra* note 5, there is no necessity to reach the Funds' contingent claim.

moving party is entitled to judgment as a matter of law.' Fed.R.Civ.Pro. 56(c). *See Charbonnages de France v. Smith,* 597 F.2d 406 (4th Cir.1979).

A genuine issue exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. *Id.* at 255, 106 S.Ct. at 2514. The plaintiff is entitled to have the credibility of all his evidence presumed. *Miller v. Leathers,* 913 F.2d 1085, 1087 (4th Cir.1990), *cert. denied,* 498 U.S. 1109, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991). The party seeking summary judgment has the initial burden to show absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The opposing party must demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510. A mere scintilla of evidence supporting the case is insufficient. *Id.*

Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.), *cert. denied,* 115 S.Ct. 68 (1994); *see also Carbon Fuel,* 891 F. Supp. at 1188-89.

B. ***Joint and Several Liability Under the Coal Act and the Wage Agreements:***

As an initial matter, the Court notes the Funds devote a substantial portion of its opening brief and exhibits

toward establishing the joint and several liability of the Adventure Plaintiffs/counter-Defendants and their other affiliates for the obligations sought in this proceeding. Adventure does not dispute the factual statement in its response and proffers no authority otherwise from the record. Adventure does appear to make a brief policy argument, without citation to supporting authority, seeking to avoid the imposition of joint and several liability. This, of course, is insufficient to contradict the Funds' undisputed and well-supported factual assertions for purposes of *Rule 56, Federal Rules of Civil Procedure.* Accordingly, the Court concludes as a matter of law Plaintiff, each related Plaintiff bankruptcy estate and the non-bankrupt Plaintiffs are jointly and severally liable for the claims asserted by the Funds.

C. ***Are the Coal Act Premiums Entitled to Administrative Expense Priority:***

The Funds assert the premiums accrued and accruing under the Coal Act are administrative expenses because, in the alternative, (1) the premiums are a tax on the Debtors' estates under 11 U.S.C. § 503(b)(1)(B); and/or (2) the premiums are an actual, necessary expense of the estates under 11 U.S.C. § 503(b)(1)(A).

As to the tax argument, the Funds claim all per beneficiary premiums are recognized as post-petition

taxes under § 503(b)(1)(B) of the Bankruptcy Code.[10] Adventure appears to concede its Combined Fund premiums are taxes and thus administrative expenses. It argues, however, the 1992 Plan premiums are pre-petition claims and in the nature of excise taxes under 11 U.S.C. § 507(a)(8)(E), thus according them less than first priority status.[11]

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[10] Sections 503(b)(1)(A) and (B) provide in pertinent part as follows:

> (b) After notice and a hearing, there shall be allowed administrative expenses . . . including –
>
> (1) (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case; [and]
>
> (B) any tax –
>
> (i) incurred by the estate, except [an excise tax under 11 U.S.C. 507(a)(8)(e).]

Id.

[11] Section 507(a)(8)(E) provides, in pertinent part, as follows:

> (a) The following expenses and claims have priority in the following order:
>
> (8) Eighth, allowed unsecured claims of *governmental units*, only to the extent that such claims are for –
>
> (E) an excise tax on –
>
> (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

The seminal case, and one of the very few cases anywhere, addressing the classification and priority of Coal Act claims is *In re Chateaugay Corp.*, 53 F.3d 478, 486 (2d Cir. 1995). In *Chateaugay*, LTV Steel Company, Inc. and several subsidiaries appealed a judgment of the district court holding that LTV's obligations under the Coal Act were incurred taxes for purposes of § 503(b)(1)(B) and thus entitled to administrative priority under § 507(a)(1). LTV, along with over fifty subsidiaries and affiliates, filed for protection under Chapter 11 on July 17, 1986. The Coal Act was enacted on October 24, 1992 and became effective February 1, 1993. Signing Stmt. of President George Bush attached to the Energy Policy Act of 1992, *reprinted in* 1992 U.S.C.C.A.N. 1953, 2534-1 at 3; *In re Chateaugay*, 53 F.3d at 487. The district court in *Chateaugay* held the assessments accruing during the bankruptcy period under the Coal act were in the nature of a tax and therefore entitled to administrative priority treatment.

The Second Circuit concluded the critical issue was whether the premiums assessed under the Coal Act were in the nature of a "claim" pre-existing the Chapter 11 petition which would, of course, have to be "disallowed." *Id.* at 496. A "claim," for purposes of the Bankruptcy Code, is defined in 11 U.S.C. § 101(5) as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent,

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> (ii) if a return is not required, *a transaction* occurring during the three years immediately preceding the date of the filing of the petition;

Id. (emphasis added).

matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. . . . " *Id.* As noted in *Chateaugay*, " 'Congress unquestionably expected this definition to have wide scope.' . . . [and intended] to invest the term 'claim' with the 'broadest possible' scope so that 'all legal obligations of the debtor . . . will be able to be dealt with in a bankruptcy case.' " *Id.* at 496-97 (quoting *In re Chateaugay*, 944 F.2d 997, 1003 (2d Cir. 1991); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1990); and H.R. Rep. No 95-595, at 310 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6267).[12] Nevertheless, the term does not have "infinite" reach. *In re Chateaugay*, 53 F.3d at 497. The court in *In re Chateaugay* determined no right to payment existed at the time of LTV's petition because, *inter alia*, no conceivable "right to payment . . . existed until the enactment of the Coal Act six years after the filing of LTV's petition." *Id.* at 497. The court went on to hold "the portion of LTV's Coal Act liability accruing during the pendency of its bankruptcy is entitled to treatment as an administrative expense of the estate pursuant to section 507(a)(1)."[13] *Id.* at 498.

Adventure would have the issue framed similarly to the analysis in *In re Chateaugay, i.e.*, whether the enactment of the Coal Act in October 1992 (predating the

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[12] Our Court of Appeals has similarly construed "claim" in sweeping fashion. *See In re Carolina Motor Express, Inc.*, 949 F.2d 107, 111 n.4 (4th Cir. 1991), *rev'd on other grounds sub nom. Reiter v. Cooper*, 504 U.S. 907 (1993).

[13] Adventure also appears to argue the contribution obligations under the Coal Act are not taxes within the meaning of 503(b)(1)(B). This argument clearly is without merit. *In re Chateaugay*, 53 F.3d at 498.

Chapter 11 petition by a couple of months) operates to give the Funds a lower priority or extinguishable pre-petition right to payment of per beneficiary premiums under the 1992 Plan.[14]

The analysis undertaken by the court in *In re Chateaugay* is, of course, not binding on this Court. Were the Court to apply the right-to-payment analysis arising from *In re Chateaugay,* however, it would conclude the "obligations" contained in the Act at the time of the petition were simply too removed and attenuated to constitute a pre-petition right to payment. As noted, the Act did not become effective until February 1993.

The Court concludes it is more appropriate to make the straightforward determination of whether the obligations at issue here were "incurred by the estate" pursuant to § 503(b)(1)(B).[15] If so, they fall squarely within that

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[14] There is one general fallacy surfacing throughout Adventure's argument which bears correction. Adventure seems to suggest their obligations are controlled not by the Coal Act, but rather by the prior NBCWAs to which Adventure was signatory. This clearly is not the law in this judicial district. *In re Chateaugay,* 53 F.3d at 497 (stating "The obligations here at issue are exclusively statutory in origin and cannot be considered a 'pay-back' for pre-petition labor. . . . LTV's liability to the Combined Fund is newly imposed by the Coal Act, not a revival of old contractual obligations."); *Carbon Fuel,* 891 F. Supp. at 1198 (stating "The parties' contractual obligations entered prior to the enactment of the Coal Act are not continued under the Act. The private provisions required by the applicable NBCWAs do not survive, nor are they codified, ratified, confirmed, or renewed.")

[15] Section 503(b)(1)(B) does not accord administrative expense status to "a tax of a kind specified in section 507(a)(8),"

section, and are thus entitled to administrative priority status without reference to § 101(5)(A). If the Court can determine the 1992 Plan per beneficiary premiums were

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i.e., an excise tax, regardless of when it is incurred. Accordingly, the Court must address whether the premiums here constitute such a tax. Adventure half-heartedly asserts the 1992 Plan per beneficiary premiums are in the nature of a pre-petition excise tax under § 507(a)(8)(E)(ii), and thus outside the reach of § 503(b)(1)(B). While the Court is aware of contrary authority, it cannot conclude the premium obligations here are excise taxes. Section 507(a)(8)(E)(ii) provides that such a tax is levied on "a *transaction* occurring during the three years immediately preceding the date of the filing of the petition." While it is possible to identify conceptually a transactional component which might support imposition of the 1992 Plan per beneficiary premiums, *see In re Rauer*, Bk. No. 95-20332, slip op. at 5, that analysis appears to stretch the limits of the section. If the remaining requirements of § 507(a)(8) were present in this case, however, it is conceivable under circuit precedent Adventure might be able to identify the necessary transactional component for application of § 507(a)(8)(E). *Cf. New Neighborhoods v. West Virginia Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989) (holding premiums due the West Virginia Workers' Compensation Fund were excise taxes under § 507, in part, because "[t]he obligation imposed upon employers by the West Virginia statute is imposed upon employers as a class and liability arises *through the transaction or act of employing*.") (emphasis added). The remaining requirements of § 507(a)(8) are clearly not satisfied though. Section 507(a)(8) requires the collecting authority to be a "governmental unit." Adventure itself forcefully (and curiously) argues against the Funds' governmental unit status, and the Court concurs in that analysis. *See* Pls.' Resp. at 14 (stating "the Coal Act § 9712(a)(1) clearly establishes the 1992 UMWA Benefit Plan as a private plan, not a 'governmental unit' as defined under Section 101(27) of the Code.") Accordingly, the 1992 Plan per beneficiary premiums cannot be excise taxes under § 507(a)(8)(E).

incurred by the estate, it also would determine "necessarily" the premiums were post-petition because "there can be no bankruptcy estate until the petition in bankruptcy is filed." *United States v. Friendship College, Inc.*, 737 F.2d 430, 431 (4th Cir. 1984).

The Bankruptcy Code does not delineate precisely when a tax obligation is "incurred" for purposes of § 503(b)(1)(B). The United States Court of Appeals for the Sixth Circuit, however, recently adopted the appropriate construction of the term. *In re Columbia Gas Trans. Corp.*, 37 F.3d 982 (6th Cir. 1994), *cert. denied sub nom. West Virginia State Dep't of Tax & Rev. v. Internal Rev. Serv.*, 115 S. Ct. 1793 (1995). The court observed: "a tax liability is generally 'incurred on the date it accrues, not on the date of the assessment or the date on which it is payable.' " *Id.* at 985; *see also* 2 William L. Norton, Jr. *et al.*, *Norton Bankruptcy Law and Practice 2d* § 42.19 (1994) ("The tax is usually deemed to be incurred at one of two times: the date of assessment of the tax or the date of accrual of the tax.") In common parlance, accrual occurs when an obligation "come[s] into existence as an enforceable claim." Webster's Third New International Dictionary 13.

The 1992 Plan per beneficiary premiums come due based on a premium rate set by the Trustees of the 1992 Plan multiplied by the number of beneficiaries attributable to the former employer who are then receiving benefits from the 1992 Plan. 26 U.S.C. §§ 9712(d)(2)(A), 9712(d)(1)(B) and 9701(c)(4). So long as an employer provides benefits for these retirees directly through the employer's own plan, as required under 26 U.S.C. § 9711, the beneficiaries are not enrolled in the 1992 Plan. This

means the employer has no 1992 Plan beneficiaries attributed to it and the Funds have no enforceable claim for per beneficiary premiums. When Adventure ceased the maintenance of its § 9711 plan in 1994, however, there arose in the Funds "an enforceable claim" for per beneficiary premiums and the premiums thus accrued on that date.

The Court therefore concludes Adventure incurred the tax obligations due the Funds after the filing of the Chapter 11 petition. Accordingly, the per beneficiary premiums for the 1992 Plan are post-petition taxes under § 503(b)(1)(B) and entitled to first priority treatment under § 507(a)(1).[16] The Funds' motion for partial summary judgment on this issue is **GRANTED.**[17]

D. *Are Adventure's Due and Owing Pre-Petition Contributions For Retirees Under the Applicable NBCWAs Entitled to Administrative Expense Priority Under 11 U.S.C. § 1114(e):*

The Funds next assert the pre-petition contributions due under the applicable NBCWAs are entitled to admin-

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[16] While not specifically challenged, the same result would appear to apply with respect to the Combined Fund premiums. Prior to February 1, 1993 the Funds did not have an enforceable claim against any operator to pay Combined Fund premiums. 26 U.S.C. §§ 9702(c), 9704(a).

[17] Adventure apparently does not challenge the treatment of prefunding premiums required under § 9712(d)(1)(A) as administrative taxes. *See* Pls.' Resp. at 2. The Funds also have a persuasive argument that the Coal Act premiums are an actual, necessary expense of the estates under 11 U.S.C. § 503(b)(1)(A). Given the disposition under § 503(b)(1)(B), however, the Court need not address this argument.

istrative expense status under 11 U.S.C. § 1114(e).[18] Adventure disagrees, asserting § 1114 was enacted only

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[18] Adventure does not dispute the NBCWA contributions which came due post-petition are entitled to administrative expense priority.

In addition to its § 1114(e) argument, the Funds also assert the NBCWA contributions are entitled to administrative expense status under 11 U.S.C. § 1113(f). A good and very recent general discussion of § 1113 can be found in *In re Lady H Coal Company*, No. 94-20449 (Bankr. S.D. W. Va. Feb. 28, 1996). Section 1113(f) provides as follows:

> (f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Id. The Funds rely heavily on the decision in *In re Unimet*, 842 F.2d 879 (6th Cir.), *cert. denied sub nom. Unimet Corp. v. United Steelworkers of America*, 488 U.S. 828 (1988), which essentially interpreted § 1113(f) to provide a superpriority for the payment of retiree benefits. *Id.* at 884. The Court declines to apply § 1113(f) in similar fashion to the retiree obligations in question here. The holding in *Unimet* was subsequently codified by Congress in § 1114. *In re Ionosphere Clubs, Inc.*, 22 F.3d 403, 408 (2d Cir. 1994) (stating "That Congress was compelled to act suggests that the protection it provided in section 1114 was not already compelled by section 1113.") The decision in *In re Ionosphere Clubs, Inc.*, 134 B.R. 515 (Bankr. S.D.N.Y. 1991) clarifies the respective scopes of § 1113 and § 1114:

> § 1114 is the *exclusive provision* relating to the modification or termination of retiree benefits. § 1114 specifically and unequivocally addresses retiree issues that are otherwise generally covered by § 1113.

Id. at 519 (emphasis added). There is significant evidence of Congressional intent supporting the exclusivity analysis of *Ionosphere*. Rather than adopting a new comprehensive provision dealing with retiree benefits, congressional bills predating § 1114 sought merely to amend § 1113 to make clear

to protect retiree benefits post-petition. A brief examination of the history of § 1114 is in order.[19]

In the mid-1980s, the fortunes of the steel industry sank dramatically. This resulted in the closure of numerous steel production facilities followed inevitably by Chapter 11 filings. Despite the presence of § 1113, many Chapter 11 debtors ceased payments for retiree benefits, arguing the Bankruptcy Code did not permit

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that its requirements regarding termination or alteration of the provisions of a collective bargaining agreement included any provision relating to benefits for retirees. *See, e.g.*, H.R. 5490, 99th Cong., 2d Sess., 132 Cong. Rec. H6507 (daily ed. Sept. 9, 1986). Congress ultimately rejected this approach. Based on the authority discussed above, the Court concludes the Funds' administrative expense argument for contributions in the nature of retiree benefits is controlled by § 1114. Section 1113 is not implicated.

To the extent administrative expense status is sought for contributions not in the nature of retiree benefit obligations, and with an awareness of contrary authority, the Court concludes § 1113(f) does not assist the Funds. Section 1113 simply does not address the priority in bankruptcy of obligations under a collective bargaining agreement.

[19] The formal legislative history of § 1114 is limited to the somewhat sketchy Senate Report on Senate Bill 548. *See* S. Rep. No. 119, 100th Cong., 1st Sess., *reprinted in* 1988 U.S.C.C.A.N. 683. The Court, however, has located a thorough analysis by a senior attorney at the Federal Deposit Insurance Corporation, discussing at length the legislative process that led to the enactment of § 1114. Andrea J. Winkler, *Legislative History of the Retiree Benefits Bankruptcy Protection Act of 1988, reprinted in* App. 1 Lawrence P. King *et al., Collier on Bankruptcy*, Part XIX (15th ed. 1995). Also helpful on the background of § 1114 is Susan J. Stabile, *Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code*, 14 Cardozo L. Rev. 1911 (1993).

such post-petition payments. The impetus for Congressional action was the Chapter 11 filing of LTV Corporation on July 17, 1986. LTV promptly suspended retirement benefit payments to over 78,000 former employees when it filed for bankruptcy protection.

Illustrating the urgency of the situation, the Senate completed enactment of a remedial measure just 13 days after LTV's suspension of payments requiring LTV and its subsidiaries to continue paying all medical and life insurance benefits to retirees. *See* 132 Cong. Rec. S9882 (daily ed. July 30, 1986). Following a series of stopgap measures over the course of the next two years, President Reagan signed the Retiree Benefits Bankruptcy Protection Act, thus putting § 1114 into effect.

Section 1114(e) provides as follows:

> (e) (1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section 'trustee, shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that –
>
> > (A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or
> >
> > (B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments,

> after which such benefits as modified shall continue to be paid by the trustee.
>
> (2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

Id.[20]

The Court cannot simply presume Congress intended to accord high priority status to pre-petition retiree benefit claims because of the general importance of such benefits or the seeming unfairness of a decision otherwise. Rather, in the absence of specific direction, the Court must be guided by a general thesis underlying the Bankruptcy Code:

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[20] Several courts have bemoaned the arduous task of interpreting § 1114. The following excerpt from a recent decision of the United States Court of Appeals for the Second Circuit is indicative:

> As our exhaustive experience with RICO has taught us, a statute which at first glance appears to be 'plain on its face,' may require substantial judicial interpretation. Section 1114 turned out to be such a statute.

In re Ames Dep't Stores, Inc., 76 F.3d 66, 68 (2d Cir. 1996) (citations omitted); *see also In re Ionosphere Clubs*, 134 B.R. at 517 (stating "[§ 1114] has spawned diverse and sometimes inconsistent interpretations and theories as to the substantive and procedural standards necessary for modification of retiree benefits. Expressed colloquially, these interpretations are all over the lot. Some are well reasoned, some conclusory with limited analysis.").

> 'One of the central themes of the Bankruptcy Code is equality of distribution. [In] *In re Mammoth Mart*, 536 F.2d 950 ([1st Cir.] 1976), the Court held "if one claimant is to be preferred over others, the purpose should be clear from the statute. To give priority to a claimant not clearly entitled thereto is not only inconsistent with the policy of equality of distribution, it dilutes the value of the priority for those creditors Congress intended to prefer." '

In Re Rayman, Martin & Fader, Inc., 170 B.R. 286, 290 (D. Md. 1994) (quoted authority omitted).

Aside from this general principle, there are specific indications Congress sought only to accord priority status to post-petition retiree benefits. While there is little reasoned case law on point, the commentator perhaps most familiar with the legislative history surrounding § 1114 has surmised as much. *See* Winkler, *Legislative History of the Retiree Benefits Bankruptcy Protection Act of 1988*, 1 *reprinted in* App. 1 Lawrence P. King *et al.*, *Collier on Bankruptcy*, Part XIX, 1894 (15th ed. 1995) (stating § 1114 "provided that retiree benefits *paid during the pendency of the case* have the status of allowed administrative expenses") (emphasis added). A leading bankruptcy commentator concurs. *See* 4 William L. Norton, Jr. *et al.*, *Norton Bankruptcy Law & Practice 2d* § 84:10 (1995) (stating "Section 1114(e)(2) grants administrative expense priority status to benefits payments *accruing post-petition* up to the reorganization plan confirmation date. Effectively, this means that any retiree insurance benefits coming due *between the filing of the petition and the confirmation date* are subordinate only to the claims of secured creditors.") (emphasis added).

It is clear the purpose of § 1114 was to remedy the harm caused by debtors such as LTV who suspend retiree benefits *following* the filing of a Chapter 11 petition. The Court is not inclined to extend the reach of § 1114 further without explicit Congressional direction. Accordingly, the Court will not accord administrative priority status to Adventure's pre-petition contributions due under the applicable NBCWAs. The Funds' motion for partial summary judgment on this issue is **DENIED.**

IV. CONCLUSION

Based on the foregoing analysis, the Court **GRANTS** in part and **DENIES** in part the Funds' motion for partial summary judgment. Administrative expense status will be accorded the Funds' claims as discussed herein. Each bankruptcy estate and the non-bankrupt Plaintiffs are jointly and severally liable for the claims asserted. The Court leaves the determination of the appropriate allowable amount of the claims to the Bankruptcy Court, pending the receipt of updated information from the Funds. With relief, this case is **DISMISSED** from the Court's docket.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: March 8, 1996

/s/ Charles H. Haden II
Charles H. Haden II, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Filed Apr. 24, 1998)

No. 96-1557
CA-94-858-2
BK-91-50509
AP-93-197

ADVENTURE RESOURCES, INCORPORATED, a West Virginia corporation; AMIGO SMOKELESS COAL COMPANY, a West Virginia corporation; TOMMY CREEK COAL COMPANY, a West Virginia corporation; GREEN MOUNTAIN ENERGY, INCORPORATED, a West Virginia corporation; M.A.E. SERVICES, INCORPORATED, a West Virginia corporation; MABEN ENERGY CORPORATION, a West Virginia corporation; RALEIGH LEASING, INCORPORATED, a West Virginia corporation; STONEY COAL COMPANY, a West Virginia corporation; SPRUCE LAUREL COAL COMPANY, a West Virginia corporation; HAWLEY COAL MINING CORPORATION, a West Virginia corporation; BICKFORD MINING, INCORPORATED, also known as Allports Coals, Incorporated, a West Virginia corporation; BARRETT FUEL CORPORATION, successor by merger to Beckley Lick Run Company, a West Virginia corporation; EAST GULF FUEL CORPORATION, a West Virginia corporation; COAL X EQUIPMENT & SUPPLY COMPANY, INCORPORATED, formerly known as Lakeside Supply Company, Incorporated, a West Virginia corporation; BECKLEY REPAIR & HYDRAULIC SERVICE, INCORPORATED, a West Virginia corporation; HALFWAY, INCORPORATED, a West Virginia corporation; CHESAPEAKE LEASING, INCORPORATED, a West Virginia corporation; PINEY FUEL CORPORATION, a West Virginia corporation; LAKESIDE LEASING, INCORPORATED, formerly known as Airplane

Leasing, Incorporated, a West Virginia corporation; RALEIGH SERVICES, INCORPORATED, a West Virginia corporation; ATLAS COAL LEASING, INCORPORATED, a West Virginia corporation; SUGAR CAMP MINING, INCORPORATED, a West Virginia corporation; H. D. ENTERPRISES, LIMITED, a West Virginia corporation; JET COAL SERVICES, INCORPORATED, a West Virginia corporation; MICROBLACK, INCORPORATED, a West Virginia corporation; DOVER COAL SALES, INCORPORATED, a West Virginia corporation; NO. 10 MINING, INCORPORATED, a West Virginia corporation; PANTHER RED ASH LAND COMPANY, INCORPORATED, a West Virginia corporation

Plaintiffs – Appellees

v.

MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, PAUL R. DEAN, Trustees of the UMWA 1950 Pension Trusts and UMWA 1974 Pension Trusts; UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST; UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST; MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, THOMAS O. S. RAND, CARLTON R. SICKLES, AND GAIL R. WILENSKY, WILLIAM P. HOBGOOD, Trustees of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED FUND; MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS F. CONNORS and ROBERT D. WALLACE, Trustees of the UMWA 1992 Benefit Plan; UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS F. CONNORS, ELLIOT A. SEGAL, Trustees of the UMWA 1993 Benefit Plan; UNITED MINE

WORKERS OF AMERICA 1993 BENEFIT PLAN; and MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOTT A. SEGAL, JOSEPH J. STAHL, II, Trustees of the UMWA Cash Cash Deferred Savings Plan of 1988; UNITED MINE WORKERS OF AMERICA CASH DEFERRED SAVINGS PLAN OF 1988

Defendants – Appellants

and

DONNA E. SHALALA, Secretary, Department of Health & Human Services, Social Security Administration of the United States of America

Defendant

No. 96-1938
CA-94-858-2
BK-91-50509
AP-93-197

ADVENTURE RESOURCES, INCORPORATED, a West Virginia Corporation

Plaintiff – Appellant

and

AMIGO SMOKELESS COAL COMPANY, a West Virginia corporation; TOMMY CREEK COAL COMPANY, a West Virginia corporation; GREEN MOUNTAIN ENERGY, INCORPORATED, a West Virginia corporation; M.A.E. SERVICES, INCORPORATED, a West Virginia corporation; MABEN ENERGY CORPORATION, a West Virginia corporation; RALEIGH LEASING, INCORPORATED, a West Virginia corporation; STONEY COAL COMPANY,

a West Virginia corporation; SPRUCE LAUREL COAL COMPANY, a West Virginia corporation; HAWLEY COAL MINING CORPORATION, a West Virginia corporation; BICKFORD MINING, INCORPORATED, also known as Allports Coals, Incorporated, a West Virginia corporation; BARRETT FUEL CORPORATION, successor by merger to Beckley Lick Run Company, a West Virginia corporation; EAST GULF FUEL CORPORATION, a West Virginia corporation; COAL X EQUIPMENT & SUPPLY COMPANY, INCORPORATED, formerly known as Lakeside Supply Company, Incorporated, a West Virginia corporation; BECKLEY REPAIR & HYDRAULIC SERVICE, INCORPORATED, a West Virginia corporation; HALFWAY, INCORPORATED, a West Virginia corporation; CHESAPEAKE LEASING, INCORPORATED, a West Virginia corporation; PINEY FUEL CORPORATION, a West Virginia corporation; LAKESIDE LEASING, INCORPORATED, formerly known as Airplane Leasing, Incorporated, a West Virginia corporation; RALEIGH SERVICES, INCORPORATED, a West Virginia corporation; ATLAS COAL LEASING, INCORPORATED, a West Virginia corporation; SUGAR CAMP MINING, INCORPORATED, a West Virginia corporation; H. D. ENTERPRISES, LIMITED, a West Virginia corporation; JET COAL SERVICES, INCORPORATED, a West Virginia corporation; MICROBLACK, INCORPORATED, a West Virginia corporation; DOVER COAL SALES, INCORPORATED, a West Virginia corporation; NO. 10 MINING, INCORPORATED, a West Virginia corporation; PANTHER RED ASH LAND COMPANY, INCORPORATED, a West Virginia corporation

Plaintiffs

v.

MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, PAUL R. DEAN, Trustees of the UMWA 1950 Pension Trusts and UMWA 1974 Pension Trusts; UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST; UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST; MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOT A. SEGAL, THOMAS O. S. RAND, CARLTON R. SICKLES, AND GAIL R. WILENSKY, WILLIAM P. HOBGOOD, Trustees of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED FUND; MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS F. CONNORS and ROBERT D. WALLACE, Trustees of the UMWA 1992 Benefit Plan; UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN; MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS F. CONNORS, ELLIOT A. SEGAL, Trustees of the UMWA 1993 Benefit Plan; UNITED MINE WORKERS OF AMERICA 1993 BENEFIT PLAN; and MICHAEL H. HOLLAND, MARTY D. HUDSON, ELLIOTT A. SEGAL, JOSEPH J. STAHL, II, Trustees of the UMWA Cash Deferred Savings Plan of 1988; UNITED MINE WORKERS OF AMERICA CASH DEFERRED SAVINGS PLAN OF 1988

Defendants – Appellees

and

DONNA E. SHALALA, Secretary, Department of Health & Human Services, Social Security Administration of the United States of America

Defendant

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

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§ 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall –

> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith

in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that –

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative

may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Added Pub.L. 98-353, Title III, § 541(a), July 10, 1984, 98 Stat. 390.

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§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to –

(A) the insolvency of financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performances of a lease of real property in a shopping center includes adequate assurance –

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or

(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for

cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages

related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.

(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate –

(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;

(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or

(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.

(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to –

(A) the right of the trustee to seek further extensions within such additional time period

granted by the court pursuant to paragraph (4); and

(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which the trustee must assume or reject an unexpired lease of nonresidential real property.

(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.

(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air

carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.

(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on –

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debts financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if –

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease –

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12 or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title –

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title –

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and –

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee, and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the

balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable non-bankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the non-performance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable non-bankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mort-gagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and –

(i) if the rejection amounts to such a breach as would entitle the timeshare

interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection, or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which

the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession –

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect –

> (A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
>
> (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed

immediately before the case commenced, for –

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract –

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive –

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall –

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall –

(A) to the extent provided in such contract or any agreement supplementary to such contract –

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

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§ 503. Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;
>
> (B) any tax –

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a

substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

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§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

(3) Third, allowed unsecured claims, but only to the extent of $4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for –

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor;

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan –

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of

the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of –

(i) the number of employees covered by each such plan multiplied by $4,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed, unsecured claims of persons –

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility –

but only to the extent of $4,000 for each such individual.

(6) Sixth, allowed unsecured claims of individuals, to the extent of $1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the

personal, family, or household use of such individuals, that were not delivered or provided.

(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt –

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for –

(A) a tax on or measured by income or gross receipts –

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending,

before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on –

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three

years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise –

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the

debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5),(a)(6),(a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.